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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner,*

v.

NAVAJO REALTY COMPANY, CECIL MCCORMICK, ET ALS.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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AZTEC LAND AND CATTLE COMPANY, your petitioner, prays that a writ of certiorari issue to review the judgments of the Supreme Court of the State of Arizona, entered in the above-entitled cases on April 21, 1955.

OPINIONS BELOW

The opinion of the Arizona Supreme Court in the Navajo County case (*Aztec Land and Cattle Co.* v. *Navajo Realty Co.; infra*, Appendix A, pp. A1-A15) is reported at 283 P. 2d 227. The opinion of the Arizona Supreme Court in the Coconino County case

(*McCormick* v. *Aztec Land and Cattle Co.; infra,* Appendix A, pp. A16-A18) is reported at 283 P. 2d 234.

JURISDICTION

1. The judgments of the Supreme Court of Arizona were entered on April 21, 1955 (*infra,* Appendix B, pp. A19-A20).

2. The federal question was raised as indicated at pp. 12-15, *infra.* The excerpts from the record showing the raising of the federal question are set out in Appendix C, *infra,* pp. A21-A32.

3. The judgment of the Supreme Court of Arizona in the Navajo County case (*infra,* p. A19) is final by its terms. The judgment of the Supreme Court of Arizona in the Coconino County case (*infra,* p. A20), remanding that case for further proceedings, is final because dispositive of the controversy so far as petitioner's rights are concerned. See *Detroit &c. Ry.,* v. *Michigan R.R. Comm.,* 240 U.S. 564, 570-571; *Clark* v. *Williard,* 292 U. S. 112, 117-119; *Market Street R. Co.* v. *Railroad Comm'n,* 324 U. S. 548, 551; *Richfield Oil Corp.* v. *State Board,* 329 U.S. 69, 72.

4. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1257(3).

QUESTION PRESENTED

Whether a state may assess a tax against a private corporation in respect of lands which, at the time of assessment, had not yet been patented to it by the United States, to which the United States then had legal title, of which the United States then had possession, over which the United States then exercised full dominion, and in respect of which the United

States during all of the period in question had been making payments in lieu of taxes to the state and its political subdivisions pursuant to federal law.[1]

STATUTES INVOLVED

The state and federal statutes involved are set forth below in Appendix D, *infra,* pp. A33-A35.

STATEMENT

This single Petition for Writ of Certiorari seeks review, pursuant to Rule 23(5), of two cases that present identical questions and that were accordingly consolidated for argument in the court below. But in the interest of clarity, the proceedings in each case will be set forth separately.

The Navajo County case, No. 5975 below. This was a proceeding brought July 13, 1953, by Navajo Realty Company and other property owners and taxpayers in Navajo County, Arizona, against petitioner Aztec and the appropriate officers of Navajo County, seeking mandamus to direct petitioner to return for purposes of taxation 37,758.56 acres of land, which it was alleged to own, and to direct the several officers to take steps to place that land on the tax rolls for purposes of the assessment and collection of taxes (Complaint, NR. 1-6; Amended Complaint, NR. 17-21).[2]

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[1] The foregoing is the basic question presented. Petitioner does not deem it necessary at this juncture to restate with more particularity "every subsidiary question fairly comprised therein" (Rule 23(1)(c)).

[2] "NR" refers to the Abstract of Record in the Navajo County case, "CR" to that in the Coconino County case.

The record as certified here includes the Abstract of Record in each case that was before the Supreme Court of Arizona, together with the proceedings in that court, as well as certain

It was alleged in the pleadings and in the affidavit in support of the taxpayers' motion for summary judgment that petitioner Aztec was the owner of the lands in question, that these lands were acquired by deed from Santa Fe and Pacific Railroad on November 7, 1905, and that the railroad in turn had acquired those lands from the United States on July 27, 1866, as part of a railroad land grant. The deed from the railroad, submitted in support of the motion for summary judgment (Exh. D, NR. 38), showed on its face that it was a quitclaim deed.[3]

The plaintiff taxpayers further alleged (NR. 23) that petitioner's ownership of the lands had been adjudicated by the U. S. District Court for the District of Columbia in 1949, whose determination had been affirmed by the U. S. Court of Appeals for the District of Columbia Circuit in *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498, and that certiorari to review the latter decision had been denied by this Court on June 2, 1952, 343 U. S. 964 (No. 702, Oct. T. 1951).

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exhibits from the Navajo County case that had been transmitted to the Supreme Court but were not extended in the Abstract.

The amended complaint in the Navajo County case added the County Treasurer as a party defendant (NR. 17-18, par. II).

[3] The granting words of the conveyance (page 2 of the deed, which is included in full in the certified record) are as follows:

> "Now, Therefore, the said Santa Fe Pacific Railroad Company, for and in consideration of the sum of one Dollar, the receipt whereof is hereby acknowledged, does hereby remise, release and quit claim unto the said Aztec Land and Cattle Company, Limited, all its right title and interest in and to the following described lands, situated in the Counties of Navajo and Coconino, in the Territory of Arizona to-wit:"

A copy of the District Court's findings of fact, conclusions of law, and judgment (NR. 27) was submitted in support of the motion.[4]

The District Court's judgment (NR. 27; CR. 43-44) was in these terms:

> "Adjudged, Ordered and Decreed, that the defendants [Secretary of the Interior; Under Secretary of the Interior; Director, Bureau of Land Management] be and they are hereby permanently enjoined from rejecting the selection and application for patent filed by the plaintiff, Santa Fe Pacific Railroad Company, in the interest of its purchaser Aztec Land and Cattle Company, Limited, designated as Phoenix 080632 in the Department of the Interior, on the ground that Santa Fe Pacific Railroad Company had not acquired any interest in the lands selected which it could convey prior to the filing of a release pursuant to Section 321(b) Title III, Part II, of the Transportation Act of 1940, or on the ground that the selection of the said lands is barred by the said release, or on the ground that Aztec Land and Cattle Company, Limited, was not and is not an innocent purchaser for value; and be and they are hereby directed to proceed to a determination of the plaintiffs' selection and application for the issuance of a patent to the said lands, pursuant to the Act of July 27, 1866, 14 Stat. 292, and Section 321(b), Title III, Part II, of the Transportation Act of 1940, 54 Stat. 954, and the Regulations of the Department of the Interior promulgated in Circular No. 1500 (6 F. R. 6699), as lands appropriated to the grant and sold to Aztec Land and

[4] These documents appear in full in the record as certified. They were not extended in the Navajo County case Abstract of Record since they were set forth *in haec verba* in the Coconino County Abstract of Record, CR. 31-44.

Cattle Company, Limited, prior to September 18, 1940."

There was also submitted in support of the motion a copy of Senate Bill 2557, 83d Congress, 1st Session (NR. 27-28),[5] which proposed to authorize the acceptance on behalf of the United States of a conveyance by petitioner of its right, title, and interest in the lands involved in the above-cited litigation, which lands included those involved in the Navajo County case.[6]

The taxpayers further alleged that the United States Department of the Interior was holding in trust for petitioner all money received from sales of timber and other resources from said lands since 1942 (NR. 24).

Petitioner's answer and opposing affidavits denied ownership of the Navajo County lands, and averred that the record title thereto was in the United States (par. IV, NR. 13) and that the lands were under the sole supervision and control of the United States Forest Service of the Department of Agriculture (NR. 32). Petitioner admitted making application for patents to the land pursuant to the decision in *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498, certiorari denied, 343 U. S. 964, but stated that no patents had been issued and that no title could vest in petitioner until the Department of the Interior had

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[5] Here again, this document was incorporated by reference in the Navajo County Abstract of Record, appears in full in the certified record, and is set out in full in the Coconino County Abstract of Record, CR. 45-48.

[6] S. 2557 was not reported out of committee during the 83d Congress. See History of Bills and Resolutions, 99 Cong. Rec., Part 13, p. 726; 100 *id.*, Part 13, p. 596.

determined that the lands which were the subject of the application were non-mineral in character and not subject to valid prior claims (NR. 32-33).

Petitioner's supporting affidavit also set forth the following:

The provisions of the basic land grant of 1866 (Act of July 27, 1866, 14 Stat. 292, [*infra*, pp. A34-A35]) as to mineral survey had not been complied with as of February 4, 1954, and therefore, until the non-mineral character of the lands had been established, no patent could issue (NR. 33).

Many claims in opposition to petitioner's application for patent were still pending, the validity of which must first be adjudicated by the Bureau of Land Management in the Department of the Interior before a patent could issue (NR. 33-34).

The claim to petitioner's lands here in question "have been in dispute, controversy and litigation from 1886 until 1952", during which period and until the date of the affidavit, February 26, 1954, possession, ownership, and title had been claimed for the United States by both the Interior Department and the Forest Service, and petitioner was excluded from the possession of the lands (NR. 34).[7]

Moreover, during all of this period, the United States "has acted in all respects as the owner of a fee simple title to said lands, has leased said lands to others for grazing purposes and has sold therefrom a valuable crop, to wit, Ponderosa Pine timber, and has

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[7] The lands here in question were withdrawn in 1898 for the Black Mesa Forest Reserve, and are within the exterior boundaries of the Coconino and Sitgreaves National Forests. See *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498, 509.

kept all of the proceeds of said leases and sales, except such portion thereof as have been remitted to the Counties of Navajo and Coconino in lieu of taxes;[8] * * * and that additional large sums have been realized from the leasing or permitting of grazing rights thereon" (NR. 35).

The foregoing allegations were not denied by the taxpayer plaintiffs.

None the less, the Superior Court for Navajo County, in a decision filed March 17, 1954 (NR. 42-50), decided that the District of Columbia judgment "granted mandamus making it mandatory that the Secretary of Interior issue patents to the Aztec Company" and, "The Judgment having commanded the Secretary of Interior to issue patents covering the lands in question, the making of application for patents is, therefore, not a condition precedent to the issuance of patents." Accordingly, the Superior Court

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[8] These payments were made pursuant to 16 U. S. C. § 500, as amended, which provides:

> "Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein."

In April 1950, Congress repealed a second proviso to the foregoing, which had read, "*Provided further*, That there shall not be paid to any State for any county an amount equal to more than 40 per centum of the total income of such county from all other sources."

adjudged that a peremptory writ of mandate should issue, directing petitioner Aztec to list its lands, and directing the County Assessor to assess them (NR. 51-55); and judgment was entered accordingly (NR. 56-58).

Petitioner thereupon moved to vacate the judgment, on, *inter alia,* these grounds (NR. 60-65):

That the court misconstrued the judgment in the District of Columbia litigation, which did not adjudicate the title in favor of petitioner, but simply enjoined the Secretary of the Interior from rejecting the selection on specified grounds, and directed him to proceed to determine petitioner's rights to have the lands patented (NR. 61-62).

That petitioner's application cannot be determined until the mineral survey required by the Act of July 27, 1866, has been completed, and the rights of adverse claimants determined; that until such time petitioner cannot become the owner of the lands; and that ownership remains in the United States until issuance of the patents (NR. 62-63).

That the pleadings and affidavits show without dispute that the legal title to the lands is in the United States, which *prima facie* determines ownership, citing *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496 (NR. 64).

This motion as well as a motion to correct the judgment were duly denied (NR. 84-85), and petitioner appealed (NR. 69, 75).

The Supreme Court of Arizona affirmed.[9] It held

[9] Except as to so much of the judgment below as directed petitioner to list its lands; this portion of the judgment was stricken, and the writ of mandamus was quashed *pro tanto.*

that there was presented no issue of fact requiring trial, and that the Assessor's list (Exh. C, NR. 30) effectively precluded taxing petitioner in respect of lands theretofore patented to others.

On the federal question involved, the Supreme Court of Arizona held that there was no merit in petitioner's contention that the land was not taxable until its mineral character had been determined, "for, as has been shown, the Circuit Court in the Chapman case held that issuance of the patents by the Secretary to such lands was merely a ministerial act." The court below moreover held, citing 43 U. S. C. § 882 (*infra*, p. A33) and *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512, that the issuance of a patent was not a prerequisite to state taxation, and that in view of Section 73-202 of the Arizona Code Annotated, 1939 (*infra*, p. A33), a claim to land was taxable so that the supervision and control of the United States over the lands in question was immaterial.

A stay of proceedings pending application to this Court was denied by the Supreme Court of Arizona on May 10, 1955. On June 2, 1955, an order granting such a stay "pending the timely filing and disposition of a petition for certiorari" was signed by Mr. Justice Douglas.

The Coconino County case, No. 5929 below. This was a similar proceeding by a group of Coconino County taxpayers in respect of some 60,932.29 acres of land in that County, allegedly belonging to petitioner and acquired in the same manner as the lands in the Navajo County case, which was brought against petitioner to list these lands, and against the county assessor and the board of supervisors to assess the lands and place them on the tax rolls (CR. 1-5).

Petitioner and the public officials filed separate motions to dismiss on the ground that the complaint did not state a claim upon which relief could be granted (CR. 21-23), and petitioner filed an answer averring that title to the lands in question was in the United States (CR. 24-26). Plaintiff's reply set up the proceedings in *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498 (App. D. C.), certiorari denied, 343 U. S. 964, and S. 2557, 83d Cong. (CR. 27-48). After the motions to dismiss were granted (CR. 49), an amended complaint, naming only petitioner and the county assessor as defendants, was filed (CR. 49-53); this was also dismissed on motion (CR. 60-63), and the taxpayer-plaintiffs appealed (CR. 63).

Included in the lands which the plaintiffs sought to have taxed to petitioner was Sec. 13, T. 14 N, R. 9 E, and the E ½ of Sec. 33, and SW ¼ of Sec. 35 in T. 14 N., R. 11 E (CR. 2, 7, 10, 18, 50).

The Supreme Court of Arizona reversed, holding that (*infra*, p. A17) "under our decision in the Navajo County case, the ruling in the instant case cannot be upheld on any theory." Accordingly (*infra*, p. A18), "the amended complaint is ordered reinstated along with the alternative writ of mandamus as to the county assessor; and the cause remanded for further proceedings not inconsistent with our holdings in these matters."

The stay sought from and then denied by the Supreme Court of Arizona, and that granted by Mr. Justice Douglas on June 2, 1955, covered this case also.

Issuance of Patents. In its opinion (*infra*, p. A11), the Supreme Court of Arizona said, "As proof of Aztec's fear that patents would not be forthcoming

was more fanciful than real was the admission made at time of oral argument that a short time prior thereto to the first of these patents, covering some 5,000 acres, had been received."

Bureau of Land Management proceedings within the realm of judicial notice[10] show that on September 21, 1954, and November 12, 1954, numerous protests against the Santa Fe Pacific Railroad Company's application for patent were dismissed (Phoenix 080632); that the application was rejected as to Sec. 13, T. 14 N., R. 9 E., which was determined to be mineral; that the land applied for in T. 14 N., R. 11 E., was unsurveyed and therefore not subject to patent; that on January 11, 1955, a patent issued to the Railroad Company for 5,619.96 acres of the land as selected, and another on March 25, 1955, for an additional 87,847.86 acres; and that patent for the balance of the lands due, estimated as involving between 1500 and 2100 acres, has not yet been issued as of the date of the filing of this Petition.[11]

HOW THE FEDERAL QUESTION WAS RAISED

(a) *Navajo County case.* (i) Petitioner in par. IV of its answer alleged that the record title to all of the lands in question was in the United States (NR. 13; *infra,* p. A21).

(ii) Plaintiffs below, in par. III of their amended complaint, alleged that petitioner acquired the lands

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[10] See *Red Canyon Sheep Co.* v. *Ickes,* 98 F. 2d 308, 312 (App. D. C.), and cases there cited.

[11] On April 12, 1955, Santa Fe duly quitclaimed the patented acreage to petitioner, in confirmation of its earlier 1905 deed (*supra,* p 4, note 3).

by deed from Santa Fe in 1905, which in turn acquired the lands as a portion of a railroad land grant from the United States dated July 27, 1866 (NR. 18; *infra,* p. A21).

(iii) Plaintiffs in par. III of their reply alleged that the ownership of the lands had been adjudicated by the United States District Court for the District of Columbia, and set out its findings, conclusions and judgment (NR. 23, 27; *infra,* pp. A21-A22); that said judgment was affirmed, citing 198 F. 2d 498, and that certiorari was denied by this Court on June 2, 1952, citing 72 U. S. [actually Sup. Ct.] 1058, rendering the judgment final (NR. 23; *infra,* p. A22); that the funds received from the sales of resources on said lands are being held in trust for petitioner, and that a bill is pending in Congress to authorize acceptance of petitioner's deed, setting forth S. 2557, 83d Cong. (NR. 24, 27-28; *infra,* p. A22).

(iv) Plaintiffs moved for summary judgment on the basis of the above findings, conclusions and judgment of the District Court, the opinion of the Court of Appeals in *Chapman* v. *Santa Fe Pac. R. Co.,* 198 F. 2d 498, and the above bill (NR. 29-30; *infra,* pp. A22-A23).

(v) Petitioner's affidavit in opposition alleged title to the lands in the United States, and control by the United States, and the non-issuance of patents pending determination of mineral character and the validity of conflicting claims; it alleged that the provisions of the basic land grant with respect to mineral surveys had not been complied with, citing the Act of Congress of July 27, 1866 (14 Stat. 292); that the claim to the lands in question had been in dispute and litigation from 1886 until 1952; and that the United States has at all times exercised dominion over the lands, has sold

timber therefrom, and has kept all the proceeds except as to such portion thereof as has been remitted to the Counties of Navajo and Coconino in lieu of taxes; and that possession and use of the lands has never been vested in petitioner (NR. 31-36; *infra,* pp. A23-A25).

(vi) The decision of the Superior Court (NR. 42-50; *infra,* pp. A25-A29) proceeds on wholly federal grounds, and cites, quotes from and discusses federal statutes and decisions.

(vii) Petitioner's motion to vacate judgment asserts that the foregoing decision misconstrues the final judgment of the U. S. District Court for the District of Columbia, above referred to, and the holding of the Court of Appeals in *Chapman* v. *Santa Fe Pac. R. Co.,* 198 F. 2d 498, affirming the same; that no mineral survey has been completed as required by the Act of July 27, 1866; and that since legal title to the lands is in the United States, this fact prima facie determines ownership, citing *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496 (NR. 60-65; *infra,* pp. A29-A31).

(viii) The opinion of the Supreme Court of Arizona (*infra,* pp. A1-A15) shows on its face that it rests on federal grounds.

(b) *Coconino County case.* (i) Petitioner in par. IV of its answer alleged that the record title to all of the lands in question was in the United States (CR. 25; *infra,* p. A31).

(ii) Plaintiffs in par. III of their reply alleged that the ownership of the lands had been adjudicated by the United States District Court for the District of Columbia, etc. (CR. 28-29; *infra,* pp. A31-A32); this allegation is identical with that made in the Navajo

County case, summarized in item (a) (iii), *supra*, p. 13.

(iii) Plaintiffs in par. II of their amended complaint alleged that petitioner acquired the lands by deed from Santa Fe in 1905, which in turn acquired the lands as a portion of a railroad land grant from the United States dated July 27, 1866 (CR. 50; *infra*, p. A32).

(iv) The Supreme Court of Arizona in its opinion (*infra*, p. A17) said that "The pleadings in the instant case are in all essential respects identical with those in the Navajo County case and—though there are no affidavits and only one exhibit—basically the issues presented and the legal points relied upon are the same. * * * under our decision in the Navajo County case, the ruling in the instant case cannot be upheld on any theory."

REASONS FOR GRANTING THE WRIT

The ruling of the Arizona Supreme Court improperly subjects petitioner to taxation in respect of property which it neither owned or possessed prior to issuance of patent, over which the United States exercised full dominion, and in respect of which the counties involved have already received payments in lieu of taxes from the United States.[12] Further, as to some of the lands now involved, no patent has yet been issued, and as to the acreage determined to be mineral, no patent will ever issue. Yet under the rationale of the rulings now sought to be reviewed, petitioner must pay taxes on all of these tracts back to 1949, or even farther back, a time when its right thereto was still being bitterly contested by the United States.

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[12] Pursuant to 16 U. S. C. § 500, as amended, set out *supra*, p. 8, note 8.

It is one matter to uphold retroactive state taxation where the taxpayer has at some time enjoyed the benefits of the property taxed. E.g., *Welch* v. *Henry,* 305 U. S. 134. But never before, so far as petitioner is aware, has a state been permitted to assess a tax on property over which the United States exercised full dominion under a claim of right, and in respect of which the United States had already made payments in lieu of taxes to the state's political subdivisions pursuant to federal law.

Apart from its inherent unfairness, unfairness which actually extends to constitutional proportions, the result reached by the Supreme Court of Arizona is in clear conflict with the rationale of numerous decisions here. *Wisconsin Railroad Co.* v. *Price County,* 133 U. S. 496; *United States* v. *Anderson,* 194 U. S. 394; *Irwin* v. *Wright,* 258 U. S. 219. Those cases teach that, until an equitable title passes from the United States, by approval of the selection list or issuance of certificate, the property is not subject to state taxation. Here petitioner's right to all of these lands was in litigation until June 1952, and, since mineral lands were not subject to selection by the very terms of the granting act (*infra,* p. A35), nothing could pass until the non-mineral character of each separate tract had been determined, determination which was not made until late in 1954. Not until then did petitioner have such an equitable title to particular land that was subject to state taxation.

The ruling below completely misapprehends the nature of petitioner's claim to the lands prior to 1954. All that was directed by the final judgment of the United States District Court on January 14, 1949, was that the Secretary of the Interior and his subordinates

(a) were enjoined from rejecting the selection on the ground that selection was barred by Santa Fe's release or on the ground that petitioner was not an innocent purchaser for value; and that they (b) were directed to proceed to a determination of the selection (NR. 27; CR. 43-44). That was all that could properly have been directed; the Secretary could not have been ordered in terms to issue a patent. See *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 238.[13] Even that direction to proceed to a determination of the selection did not become final until, after affirmance by the Court of Appeals (*Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498), this Court denied certiorari on June 2, 1952 (343 U. S. 964). And until the Interior Department, late in 1954, completed its determination of the character of the land as mineral or otherwise, the very terms of the granting act (*infra*, p. A35) prevented the passing of even a beneficial interest; nor, until adverse claims had been adjudicated, could the extent of petitioner's rights to specific parcels of land be determined. Not until then was it possible for anyone to identify the particular tracts that passed to this

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[13] There the court below had remanded the cause "with instructions to enter a decree restraining defendants from rejecting and canceling plaintiff's selection list, with directions to vacate the order withdrawing the land in suit for a power site, and to approve plaintiff's selection for patent." *Central P. R. Co.* v. *Lane*, 46 App. D. C. 374, 395. This Court however concluded (*Payne* v. *Central Pac. Ry. Co.*, 255 U. S. at 238) that "an injunction should issue directing a disposal of the selection on its merits, unaffected by the withdrawal. Such an injunction, we think, is better suited to the occasion than that indicated by the Court of Appeals." The final judgment in petitioner's case against the Secretary (NR. 27; CR. 43-44) followed this Court's ruling in the *Central Pacific* litigation.

petitioner.[14] And possession was not relinquished until, by the issuance of patents, title to the land passed from the United States.[15]

The fact that, more than three years after the termination of the litigation, the Land Department has not yet completed its adjudication of petitioner's claims, is eloquent evidence that, *non constat* the assumption of the court below (*infra*, pp. A7, A9), more than simple ministerial action on the Secretary's part was involved.

Nor was the Arizona Supreme Court on sounder ground when it rested its ruling on 43 U. S. C. § 882 (*infra*, p. A33) and *Central Pacific Railroad* v. *Nevada*, 162 U. S. 512.

That statute, which was part of the Act of July 10, 1886, c. 764, 24 Stat. 143, was passed to obviate the result of the decisions in *Railway Company* v. *Prescott*, 16 Wall. 603; *Railway Company* v. *McShane*, 22 Wall. 444; and *Northern Pacific R.R.* v. *Traill County*, 115 U. S. 600, which had held that railroad grant land was not taxable by the states where patents had not been

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[14] As has been shown, *supra*, p. 12, one tract was excluded in 1954 because mineral; one because it was not yet surveyed; and patent to a substantial acreage had not yet issued at the time of filing of this Petition. Under the decisions sought to be reviewed, however, all of these tracts are taxable to the petitioner back to at least 1949.

[15] See letter from Assistant Secretary of Agriculture E. L. Peterson, April 29, 1955, referring to these very Aztec lands, 101 Cong. Rec. 6059 (daily ed., May 26, 1955): "Forest Service responsibility ceases completely the day title passes and any contractual relations the Forest Service may have with timber operators, stockmen, or other national forest users become null and void."

issued, because until then title thereto was in the United States, even where non-issuance of the patents was a consequence of the railroad grantees' wilful default in payment of survey fees in order to avoid issuance of patents so that the grantees could escape such taxation. The railroads could and did sell their unpatented lands to purchasers with the extra inducement of freedom from local taxation (17 Cong. Rec. 3719). Hence the purpose of the statute, as its sponsors indicated, was to waive the Government's lien (17 Cong. Rec. 5142-5143, 5145), and to tax those who exercised dominion over the granted lands (17 Cong. Rec. 2201, 5145). But, "If the companies are not entitled to the land—and by this bill we do not propose or pretend to pass upon that question—if they are not entitled to the lands, then under this bill the lands would not be taxable" (17 Cong. Rec. 6166). Therefore when, in *Central Pacific Railroad* v. *Nevada,* 162 U. S. 512, this Court sustained a state tax on unpatented railroad land, it was dealing with lands that had been in the company's possession for thirty years, and that the company had offered for sale and sold as its own (162 U. S. at 526).

It may be conceded that the retention of bare legal title in the United States is not material. But the Arizona court is completely in error in holding that the fact of the Government's supervision and control over the lands in question is "unimportant" (*infra,* p. A8). For neither the statute nor the decision cited constitute authority for assessing a state tax in respect of property which at the time of such taxation was in the possession and enjoyment of the United States under a claim of right—the situation here. And this petitioner, far from refusing to pay survey fees in order to avoid issuance of patents, had no opportunity

to pay such fees prior to 1954 and 1955 because it was not earlier recognized by the United States as entitled to the lands in question.

Finally, the Arizona court relied upon the terms of Section 73-202, Arizona Code Annotated, 1939 (*infra*, p. A33), defining real estate subject to taxation as including a "claim to * * * any land". But it is hardly possible to support the ruling below on the basis that a state may tax, and hence burden, a claim against the United States pressed under and pursuant to an Act of Congress before that claim has been recognized as valid by the United States.[16]

The present petition does not present any question of labels, any niceties as to "title", "equitable interest", or the like; nor is petitioner seeking to avoid state taxation where it is in full beneficial ownership of property the legal title to which is in the Government as trustee. Cf. *West* v. *Oklahoma Tax Comm'n*, 334 U. S. 717. Subsequent to the issuance of patents, petitioner duly returned the patented land for taxation. All that petitioner asserts here is that it cannot be legally assessed state taxes before then, in respect of property which at all times material to this litiga-

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[16] Little time need be spent on the suggestion of the Superior Court of Navajo County, based on the allegations in the taxpayers' reply (NR. 24) that all money received from sales of the timber on the lands since 1942 is being held in trust for the petitioner, that "This in itself indicates that the government recognizes ownership in the Aztec Company" (NR. 49). The short answer is that for ten years after 1942 the Government was vigorously denying that petitioner had any rights whatever in the land. See *Atlantic & Pacific R. Co. et al.*, 58 I. D. 588; *Krug* v. *Santa Fe Pac. R. Co.*, 158 F. 2d 317 (App. D. C.); *Chapman* v. *Santa Fe Pac. R. Co.*, 198 F. 2d 498 (App. D. C.), certiorari denied, 343 U. S. 964 (No. 702, Oct. T. 1951; June 2, 1952).

tion was in the possession of the United States, over which the United States exercised the fullest dominion, and in respect of which the United States has already made payments in lieu of taxes to these very counties pursuant to Act of Congress.

Petitioner is aware that other cases similar to these two may not be of frequent future occurrence, and that the very misconstructions and misunderstandings of federal law which permeate the opinion of the Arizona Supreme Court are so egregious that they will not often be repeated. But if extraordinary mutilation of a federal right by a state court should in and of itself militate against review here, then such rights will have become *caput lupinum* in state courts, and can there be disregarded with impunity, because of virtual immunity from correction.

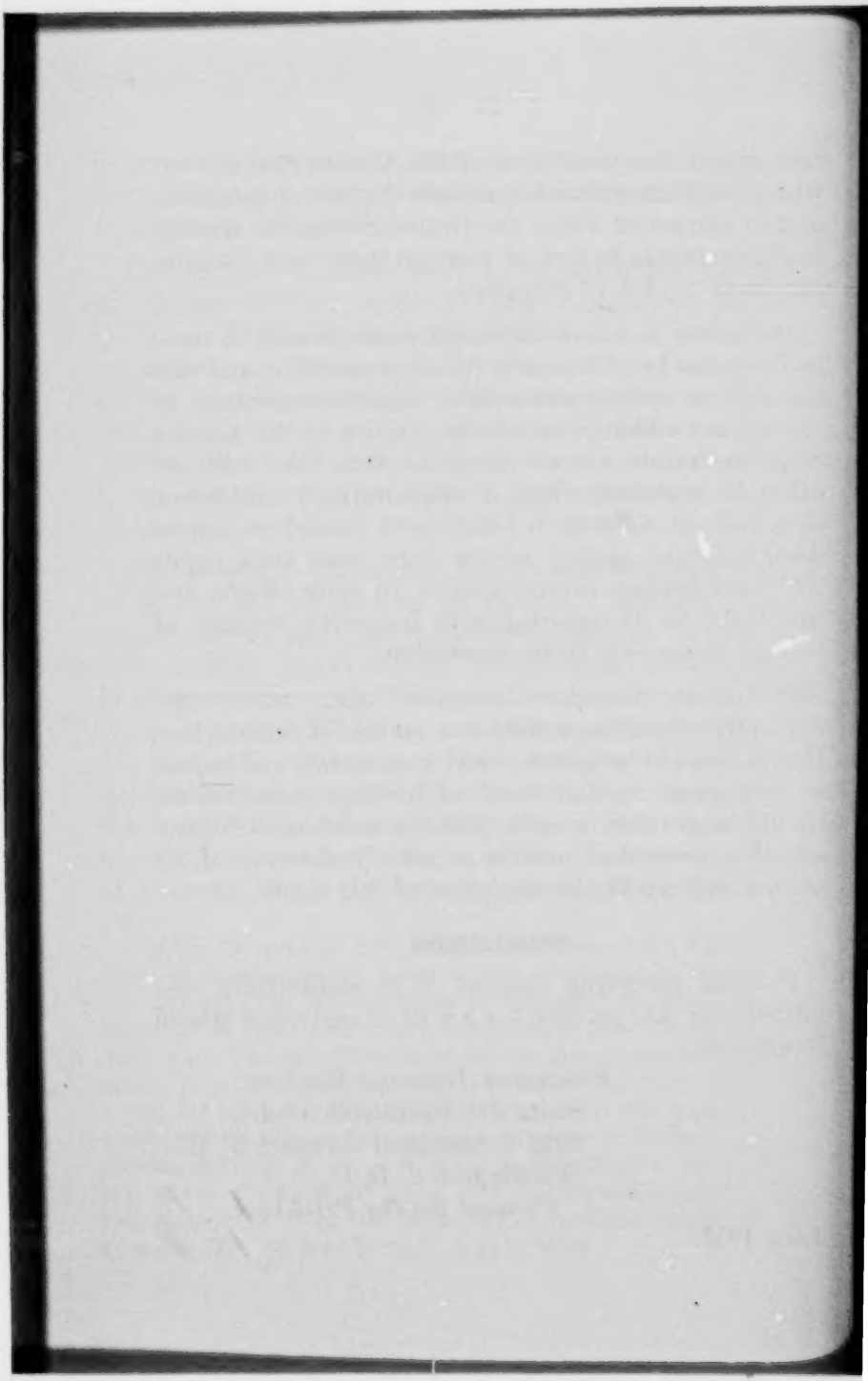
Petitioner therefore submits that, where the obviously erroneous result, as a matter of federal law, that is reached by a state court is as unfair and indeed as outrageous as that involved in these cases, review should be granted in order that the substantial federal question presented may be correctly determined, in accord with applicable decisions of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioner.

JULY 1955.



APPENDIX

APPENDIX A

OPINIONS BELOW

(a) Navajo County Case

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 5975

AZTEC LAND and CATTLE COMPANY, a corporation
Appellant,

vs.

NAVAJO REALTY COMPANY, a corporation; OLDS BROTHERS LUMBER COMPANY, a corporation; HERMAN SUGHRUE, d.b.a. Winslow Drug Company; BERT HAWKINS, d.b.a. Hawkins Texaco Super Service Station; and E. R. CROZIER,
Appellees.

Appeal from the Superior Court of Navajo County Honorable Don T. Udall, Judge

Judgment affirmed as modified

McQuatters & Stevenson, of Flagstaff, Attorneys for Appellant.

Ross F. Jones, the Attorney General, P. H. Brooke, of Winslow, Special Counsel, Alfred B. Carr, Assistant Attorney General, Attorneys for Appellees.

UDALL, *Justice.*

This is an appeal by Aztec Land and Cattle Company, Ltd., a corporation (defendant in the court below and hereinafter referred to as Aztec), from a summary judgment

holding certain of its lands to be subject to taxation. The suit was initiated by a group of taxpayers of Navajo County, hereinafter termed plaintiffs, who sought a writ of mandamus to require Aztec to supply the county assessor with a list of lands owned by it in Navajo County, and to direct the assessor (who with other public officials of the county were named as parties defendant) to place said lands on the assessment roll and to assess the same.

An alternative writ of mandamus was issued. Aztec filed a motion to dismiss, which was denied, and then a verified answer to the complaint. The public officials named as defendants also filed answers which we need not analyze as they are not parties to this appeal. Plaintiffs then filed a reply to the answer of all defendants and shortly thereafter followed with a motion for summary judgment supported by three documentary exhibits to which we will later refer. Aztec filed a memorandum in opposition to said motion together with the supporting affidavit of its vice-president, T. W. Cabeen. Other memoranda, affidavits and exhibits were filed by the respective parties. After the matter had been orally argued and fully briefed the trial court rendered a written decision granting plaintiffs' motion for summary judgment. A formal written judgment was later entered which directed the issuance of peremptory writs of mandamus to Aztec and the county assessor. Aztec then filed a motion to vacate judgment and also a motion to correct the judgment and the peremptory writs of mandamus, which were by the court denied. This appeal followed.

While a challenge is made as to the sufficiency of the complaint to state a claim upon which relief can be granted, the principal assignment of error is that it was error to grant plaintiffs' motion for summary judgment for the reason that the pleadings and entire record before the trial court revealed the existence of genuine issues of material fact between the parties. Plaintiffs challenge the correctness of this statement.

It is well established that in determining such motion, made under Rule 56, Rules Civ. Proc. (now appearing as Sec. 21-1210, et seq., A.C.A. 1939), the court does not try issues of fact but only determines whether the same are genuine and in good faith disputed. See, Malta v. Phoenix Title and Trust Co., 76 Ariz. 116, 259 P. 2d 554, and Stevens v. Anderson, 75 Ariz. 331, 256 P. 2d 712, together with the cases therein cited as to when a motion for summary judgment should or should not be granted.

While there are certain minor matters, hereinafter discussed, which Aztec contends are issues to be tried, the principal fact issue which Aztec claims defeats plaintiffs' right to summary judgment concerns the ownership of the lands in question. The complaint alleges that Aztec is the owner thereof, which the latter in its answer denies, asserting that the record title is in the United States of America; however, in its reply plaintiffs allege that the ownership of these "indemnity strip" lands as between the government and Aztec was adjudicated in the cases of Krug v. Santa Fe Pac. R. Co. (D.C. Cir.), 158 F. 2d 317, and more particularly in Chapman v. Santa Fe Pac. R. Co. (D.C. Cir.), 198 F. 2d 498, certiorari denied 343 U.S. 964, 72 S. Ct. 1058, 96 L. Ed. 1361. Hence it is plaintiffs' position that the question of ownership is one of law which the trial court was empowered to decide on motion for summary judgment. A determination of whose position is correct is, we believe, the crux of the whole case.

Unquestionably, it was the impact of the decision in the Chapman case that gave rise to the instant suit to place on the tax rolls of Navajo County the lands here in question. These lands may be generally described as 62 odd-numbered sections, comprising some 37,758.56 acres, lying in five townships (i.e., T. 13 N., R. 15 E; T. 12 N., Ranges 16 and 17 E.; T. 10 N., R. 20 E.; and T. 11 N., R. 21 E.) located in the Pinedale and Heber areas on the Sitgreaves National Forest, and all are in what is known as the "in-

demnity strip". T. W. Cabeen, vice-president of Aztec, correctly states in his affidavit that claim to said lands has "been in dispute, controversy and litigation from 1886 to 1952", that is until June 2, 1952, when the Supreme Court of the United States denied certiorari in the Chapman case. (See 72 S. Ct. 1058).

In order to resolve the problem presented as to ownership, etc., it is necessary that we state the facts leading up to the Chapman case as well as analyzing the holding of that decision, and in addition to set forth other matters that have a particular bearing on the instant controversy.

Inasmuch as reported decisions in the Krug and Chapman cases, supra, recite in great detail the history of the title to the Aztec lands, we shall do no more than succinctly outline—in chronological order—the various steps taken as they affect the lands here in question:

(1) Congress, by the Act of July 27, 1866, to aid in the construction of a railroad to the Pacific coast, granted to the Atlantic & Pacific Railroad Company the odd-numbered sections of public lands for 40 miles either side of its projected line; this area is described as the "place" limits. Within an additional 10-mile strip known as the "indemnity" limits, the Act granted the right to select sufficient lands to make up any deficiency in the "place" limits arising from homestead entries, pre-emptions, mineral lands, etc.

(2) On March 12, 1872 the Atlantic & Pacific filed with the Secretary of the Interior a map of definite location, and thereafter the railroad was constructed.

(3) On February 3, 1886 the Atlantic & Pacific contracted to sell 1,000,000 acres to Aztec.

(4) By Act of Congress dated March 3, 1897 the Santa Fe Pacific Railroad Company (hereinafter called Santa Fe) was created.

(5) On June 2, 1897 a Special Master, acting in behalf of Atlantic-Pacific, deeded all of its right and interest in and to said lands to the Santa Fe, which deed was recorded with the county recorder of Navajo County.

(6) On August 17, 1898, by executive proclamation, some 98,690.83 unsurveyed acres, lying in the "indemnity" strip, claimed by Aztec were withdrawn for a forest reserve.

(7) On November 7, 1905, Santa Fe conveyed to Aztec the balance of the lands due it under its original contract. This deed was recorded in Navajo County and specifically describes all of the lands involved in this suit.

(8) By October 14, 1939, all of the lands in question had been surveyed.

(9) On June 26, 1942, the Santa Fe filed selections in the form prescribed by the Secretary of the Interior of the land previously sold and conveyed to Aztec. Those selections were denied on the ground that the land had not been identified so that the railroad acquired any interest in specific lands which it could convey.

(10) On January 14, 1949, Federal District Judge Holtzoff, in the trial of the Chapman case, found as a fact:

> "9. Prior to and at the time of the said withdrawal, (Forest Reserve) and at all times thereafter to and including 1940, the unsatisfied losses in the place limits of the grant exceeded the surveyed lands within the indemnity limits of the grant available for selection, and to that extent there was and has been a deficiency in the grant since some time prior to August 17, 1898, of not less than 100,000 acres."

A careful reading of the decision of the United States Circuit Court of Appeal, District of Columbia Circuit, in the Chapman case (198 F. 2d 498), makes crystal clear certain points, viz.:

(1) The executive proclamation of 1898 purportedly withdrawing for inclusion in a national forest the 98,690.83

acres of "indemnity" lands (the acreages in question here being a part thereof) was of no legal significance as it did not impair or in any way defeat the rights of the Santa Fe to such lands.

(2) As to the matter of ownership in answer to the contention of the Secretary of the Interior that irrespective of the existence of a deficiency, Santa Fe could have acquired no interest in the lands conveyed to Aztec without a formal selection the Circuit Court quoting from the Krug decision, stated:

> "'While it is true that, as a general rule, selection is necessary to vest any right to specific indemnity land in the grantee, the Supreme Court has long recognized an exception where there is a deficiency of indemnity land to satisfy losses in place.'
>
> "This was in effect what the Supreme Court held in United States v. Northern Pacific Ry. Co., supra."

The opinion then went on to say:

> "In the United States v. Northern Pacific Ry. Co. case, supra, Mr. Justice Van Devanter said, in effect, that the government could not deprive these land grant railroads of their rights to 'place' and 'indemnity' lands. And that is in effect what the government is trying to do here. At first no surveys were made which would have enabled the Santa Fe to make selections. Then the specific 98,690.83 acres and other lands were withdrawn as part of a forest reserve. Consequently, no selection could have been made until after the decision in the Forest Reserve case, United States v. Northern Pacific Ry. Co., supra. (256 U.S. 66-67)
>
> "It should be remembered that the railroad must select indemnity lands under the direction of the Secretary of the Interior, and that officer has consistently ruled no selection can be made or approved until the lands in question are surveyed. The government cannot take advantage of its own wrong or at least its own failure to act. We hold that the right of selection

vested at the earliest time there was a deficiency of indemnity lands to satisfy losses in place. The government, by additional surveys could not defeat the Santa Fe's right of selection. The District Court found as a fact that a deficiency did in fact continue up to 1940 and *consequently no selection was necessary to vest title in the Santa Fe.* This finding was adequately supported by the evidence and in this conclusion we concur.

"If there was a deficiency in the indemnity lands to satisfy losses in place, and we so hold, then no selection was necessary by Santa Fe to vest this right in railroad. This was our decision when this case was before this court the last time, Krug v. Santa Fe Pacific Railroad Co., supra, and we affirm our conclusion there." (158 F. 2d 317, 320). (Emphasis supplied)

(3) Upon the whole record before it the court in effect declared that even though the legal title remained in the United States, it was holding this title in trust for Aztec, hence the issuance of patents therefor became a mere ministerial duty of the Secretary of the Interior or of those under him.

Considering the pleadings, affidavits and exhibits in the instant case, as well as the federal decisions in the Chapman and Krug cases, which have to do with the particular lands here involved, can it be said that there is any genuine issue as to any material facts or was the trial court correct in its holding that plaintiff was entitled to judgment as a matter of law? Let us test each of the purported factual issues which Aztec claims to exist.

(a) As to the matter of ownership of the lands in question: it is our firm opinion that the Chapman decision, properly construed, unequivocally establishes, as a matter of law, Aztec to be the equitable owner of said realty.

Aztec strongly relies upon the following pronouncement made by this court in the case of Aztec Land & Cattle Co. v. County of Navajo, 9 Ariz. 308, 80 P. 318 (1905):

"It is settled that no interest is acquired by the selection of lieu lands, such as are described in the complaint, which will subject them to local taxation, until the approval of the selection by the secretary of the interior. *Wisconsin Central Ry. Co.* v. *Price County*, 133 U.S. 496, 10 Sup. Ct. 341, 33 L. Ed. 687; * * *."

There are factual differences that distinguish both of these cases. Furthermore they are inapplicable to the instant situation because the rights between Aztec and the United States have—as we have pointed out—been fully adjudicated by the Krug and Chapman decisions, supra.

(b) The claim that the executive order establishing a forest reserve, not having been formally revoked, created a question of fact is wholly without merit as the court's decree nullified it as to these lands. The invalidity of such a withdrawal was first established in the case of United States v. Northern Pac. Ry. Co., 256 U.S. 51, 41 S. Ct. 439, 65 L. Ed. 825.

(c) No factual question is raised by Aztec's assertion that the lands in question were then and for many years prior thereto had been under the supervision and control of the United States and its agencies. From the standpoint of taxation this becomes unimportant. Chapter 73 of A.C.A. 1939 entitled "Taxation", and more particularly article 2 thereof, dealing with "property subject to taxation", specifically defines in section 73-202 the term "real estate" to "* * * mean and include the ownership of, or claim to, or possession of, or right of possession to, any land * * *", and the law further provides that it is the duty of the county assessor to assess property of this character to its owners.

(d) Aztec asserts the right of plaintiff to maintain the action is a fact in issue, the allegations of the complaint that they are taxpayers and property owners being denied in the answer. A similar contention was raised in the case

of Trico Electric Cooperative v. Ralston, 67 Ariz. 358, 196 P. 2d 470, and what was there said is applicable here:

> "* * * Denials that plaintiffs were land owners, customers of and dependent upon Eloy Company for electric energy and water are only addressed to question plaintiffs' capacity to sue. This issue was not properly presented. '* * * When a party desires to raise an issue as to * * * the capacity of any party to sue or be sued * * * he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.' Section 21-413, A.C.A. 1939."

(e) Aztec also contends that its denial of plaintiffs' allegations of demand upon it to list, and the refusal of the county assessor to place the lands upon the tax rolls and assess the same, raises an issue of fact. However, the answer of defendant assessor admits a demand made upon him, and as we are of the opinion, as will be hereafter developed, that Aztec cannot by writ of mandamus be compelled to list the lands for taxation, therefore, whether demand was made or not, this issue, as raised by the pleadings, becomes immaterial.

(f) Finally it is urged that Mr. Cabeen's affidavit raises an additional question of fact for determination, i.e., that this action was premature in that the land was not taxable until the Bureau of Land Management had made a determination as to the mineral character of said lands and the matter of adverse claims had been settled by the issuance of patents to Aztec. We do not believe there is any merit to this contention for, as has been shown, the Circuit Court in the Chapman case held that issuance of the patents by the Secretary to such lands was merely a ministerial act. For a statement of the applicable rule of law see, 73 C.J.S., Public Lands, section 189. Moreover, the Congress of the United States has answered the question of whether the issuance of a patent is a pre-requisite to taxing the lands. Title 43, Sec. 882, U.S.C.A., reads:

> "*Surveyed Lands Taxable Notwithstanding Lien; provisos.* No lands granted to any railroad corporation by any Act of Congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the cost of surveying, selecting, and conveying the same, or because no patent has been issued therefor; * * *." (July 10, 1886, c. 764, Sec. 24 Stat. 143.)

The contention here made was rejected by the Supreme Court of the United States in the case of Central Pacific R. Co. v. State of Nevada, 162 U.S. 512, 16 S. Ct. 885, 40 L. Ed. 1057, where the court said:

> "* * * although lands sold by the United States may be taxed before the government has parted with the legal title by issuing the patent, this principle was to be understood as applicable only to cases where the right to the patent is complete, and the equitable title fully vested, * * *."

and as to the mineral character the court went on to say:

> "2. It is further claimed that no lands granted to this road can be taxed prior to the issue of the patent, because the grant excludes mineral lands; not only minerals but mineral lands; that the right and power to ascertain which of the lands are mineral and which nonmineral is vested exclusively in the officers of the government, and can be proved only by the issue of a patent, as held by this court in Barden v. Northern P. R. Co., 154 U.S. 288 (38:992). * * *"
>
> * * *
>
> "* * * The possibility, however, that minerals might be discovered upon certain sections of these lands, as to which the title of the railway company might be defeasible, would not impair their title to the great bulk of the grant, or enable the company with respect thereto to evade its just obligations to the state. Should the company disclaim a right to the possession of any portion of these lands by reason of the discovery of minerals thereon, there would remain no right to tax them under the statutes of Nevada, but so long as the company asserts a possessory claim to them it im-

> plies a corresponding obligation to pay the taxes upon them. State v. Central P. R. Co., 20 Nev. 372."

As to adverse claims arising from lands that had been homesteaded or pre-empted within the indemnity strip under public land laws during the period 1886-1952, it is to be noted from a certificate of the assessor appearing in the files that all such tracts which were assessed to others at the time the instant suit was filed were not being duplicated on Aztec's assessment and the judgment and peremptory writ so provide. Hence we believe, therefore, that it became unimportant that the usual processing of claims preparatory to the issuance of patents still remained to be done as this could not defeat the State's right to tax the property. Central Pacific Railroad Company v. State of Nevada, supra.

As proof of Aztec's fear that patents would not be forthcoming was more fanciful than real was the admission made at time of oral argument that a short time prior thereto the first of these patents, covering some 5,000 acres, had been received.

In support of its attack upon the sufficiency of the complaint to state a claim for relief, Aztec sets forth the following proposition of law:

> "A complaint should be dismissed where it appears on its face that the statutory period for the performance of the duties sought to be enforced against the defendants had expired, or where the statute shows that the defendants are not subject to an action in mandamus."

Chapter 73, A.C.A. 1939, provides in detail the method whereby property shall be placed upon the tax rolls and assessment made. Under its provisions, the duty to make such assessments devolves upon different officials at different times during the year, viz.: the county assessor (Section 73-402), the county board of supervisors (73-418), the state tax commission (73-420), and county treasurer (73-

704). However, throughout the year omitted property that is escaping taxation may always find its way onto the tax rolls through the action of one or more of these various officials. See, State Tax Com. v. Board of Supervisors, 43 Ariz. 156, 29 P. 2d 733.

Aztec contends that when the complaint was filed on July 13, 1953 and service had, neither the assessor nor the county supervisors could place property upon the roll without an order from the state tax commission (not a party to the action) and hence the former then had no duty, performance of which could be compelled by mandamus. However, we are of the opinion the time when the judgment was entered controls. At that time (March 22, 1954) the duty and authority to list lands for taxation rested upon the county assessor (73-402, supra) and to him the peremptory writ was properly directed. Prior to judgment the action was dismissed and alternative writ of mandamus quashed as the county treasurer and the board of supervisors.

It is next contended the complaint should have been dismissed as to Aztec because it had no "duty resulting from an office, trust or station", and it was therefore not subject to a mandamus action. We cannot agree with this contention. The law is stated thus in 35 Am. Jur., Mandamus, section 327:

> "A mandamus proceeding is properly directed against the officer, body, corporation, or person whose duty it is to perform the act sought to be enforced. Technically, such party is the only necessary party respondent or defendant; therefore, those whose cooperation is not needed to secure the end sought need not be joined. Generally, however, *all those who will be affected by the judgment should be made parties and may be brought in or intervene.* Thus *when mandamus is invoked in a case relating to real property, all persons having an interest in the property must be made parties to the proceeding* * * *." (Emphasis supplied)

Further, the following appears in 55 C. J. S., Mandamus, section 253:

> "As a general rule all persons or parties having an interest in the subject matter of a mandamus proceeding, particularly *those individuals or corporations who have a special legal interest therein and whose rights may be affected or will be collaterally determined by a judgment awarding the writ, may properly be joined as parties* respondent or defendant * * * although their interest may be slight, and * * * they are usually required to be so joined; and *the fact that the performance of no duty is asked of them is of no importance.* * * *" (Emphasis supplied)

Obviously the judgment awarding the writ affected the legal interests of Aztec in the subject lands, and therefore it was properly before the court, and the propriety of subjecting these lands to taxation could be determined by this method.

There is a dearth of authority upon the question as to whether a writ of mandamus will issue to compel a private corporation to list its property for taxation as required by statute. The following statement appears in 34 Am. Jur., Mandamus, section 96:

> "* * * it is held in regard to the return of corporate property for taxation that if the statutes have provided another adequate remedy, in case of a non-return of its property by a corporation, mandamus will not lie to compel it to make a return, although it is recognized that if no remedy has been provided for by the statutes, in case of a failure to make the return, mandamus would lie to compel a return."

The only case cited as authority for this statement is Louisville & N.A.R. Co. v. State, 25 Ind. 177, 87 Am. Dec. 358, wherein the court stated:

> "* * * If it were not provided by statute that, upon failure of the railroad company to file such statement within the time required by law, the auditor of the county shall proceed to make the same, a *mandamus*

> would doubtless lie to compel the officers of the railroad to furnish the list after the time had expired; but the rule is well established that *mandamus* will not lie where the statute has expressly provided another adequate remedy. Upon the failure of the appellant to comply with the law, it became the duty of the auditor of the proper county to prepare the statement, and the auditor of state could look only to him. * * *"

From this it follows the provisions of our statute are determinative in the instant case. Section 73-402, A.C.A. 1939, provides in part:

> "* * * If any person shall neglect or refuse on demand, or fail without demand of the assessor or his deputy, to give * * * the list required * * * the assessor shall fill out a list for such person * * *."

It seems obvious that the legislature has provided an adequate means whereby property which is not listed by a taxpayer shall be placed upon the rolls for taxation. It follows that a writ of mandamus directed to the taxpayer is not necessary to accomplish this end, and Aztec, though a proper party to the action, it having rights determined thereby, should not have been directed to peremptorily list its property for taxation.

There are other minor claimed errors that we shall not discuss, as to do so would unduly extend this already lengthy opinion, suffice it to say that all such matters have been carefully considered and found to be without merit.

That portion of the judgment directing a peremptory writ of mandamus issue to Aztec, requiring it to list that portion of the lands described therein which it claims or owns, is ordered stricken and the peremptory writ issued

pursuant thereto to Aztec is ordered quashed; in all other respects the judgment of the trial court is affirmed.

LEVI S. UDALL
Justice

CONCURRING:

ARTHUR T. LAPRADE
Chief Justice

M. T. PHELPS
Justice

DUDLEY W. WINDES
Justice

FRED C. STRUCKMEYER, JR.
Justice

(b) Coconino County Case

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 5929

CECIL MCCORMICK and NONA MCCORMICK, husband and wife; CHESTER ANDERSON, d.b.a. Northern Arizona Warehouse Co.; CHESTER VAN COURT, d.b.a. Van Court's Garage; and J. E. KNOWLES, d.b.a. Moore Drug Company, *Appellants,*

vs.

AZTEC LAND and CATTLE COMPANY, a corporation; D. L. MCKINNEY, as Assessor for Coconino County, *Appellees.*

Appeal from Superior Court of Coconino County Honorable H. L. Russell, Judge

Judgment reversed with directions

Ross F. Jones, the Attorney General, P. H. Brooks, of Winslow, Special Counsel, Alfred B. Carr and Robert C. Stubbs, Assistants to the Attorney General, Attorneys for Appellants.

McQuatters & Stevenson, of Flagstaff, Attorneys for Appellee Aztec Land and Cattle Company

H. K. Mangum, Coconino County Attorney, Attorney for County Assessor.

UDALL, *Justice.*

This is a companion case to Aztec Land and Cattle Company, Ltd., v. Navajo Realty Company, et al., No. 5975 (decided this date and not yet reported). The cases were here ordered consolidated for oral argument though they arose in different counties and were separately briefed.

Plaintiffs (appellants) were a group of resident taxpayers of Coconino County who, on July 13, 1953, sought a writ of mandamus to require Aztec to list and the county assessor and the board of supervisors to assess and place on the tax roll some 60,932.29 acres of "indemnity" lands lying in Coconino County, allegedly belonging to Aztec and acquired in the same manner as the lands in the companion case, supra. Alternative writs of mandamus were issued and served upon the defendants. The public officials, represented by the county attorney, and Aztec by its counsel, filed separate motions to dismiss the complaint as not stating a claim upon which relief could be granted. Aztec also filed a verified answer to which plaintiffs filed a reply. Thereafter the trial court granted the motions to dismiss and granted plaintiffs ten days in which to file an amended complaint. An amended complaint naming only Aztec and the county assessor was filed on March 8, 1954; amended alternative writs of mandamus were issued; new motions to dismiss were then filed; the motions were granted, the amended complaint dismissed with prejudice and the amended alternative writs of mandamus quashed. This appeal by the taxpayer-plaintiffs followed.

The pleadings in the instant case are in all essential respects identical with those in the Navajo County case and —though there are no affidavits and only one exhibit—basically the issues presented and the legal points relied upon are the same. Counsel for Aztec urge that the motion to dismiss which the trial court granted be here adjudicated as a motion for summary judgment for defendants under Rule 12 (b), Rules Civil Procedure, as amended, effective October 1, 1949 (Sec. 21-429, A.C.A. 1952 Cum. Supp.). See Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P. 2d 554. However, in our opinion it matters not how this motion be considered for, under our decision in the Navajo County case, the ruling in the instant case cannot be upheld on any theory.

For the reasons stated in the companion case No. 5975, supra, the judgment of dismissal is reversed; the amended complaint is ordered reinstated along with the alternative writ of mandamus as to the county assessor; and the cause remanded for further proceedings not inconsistent with our holdings in these matters.

Judgment reversed with directions.

LEVI S. UDALL
Justice

CONCURRING:

ARTHUR T. LAPRADE
Chief Justice

M. T. PHELPS
Justice

DUDLEY W. WINDES
Justice

FRED C. STRUCKMEYER, JR.
Justice

APPENDIX B

JUDGMENTS BELOW

The Clerk of the Supreme Court of Arizona, Eugenia Davis, advises under date of June 24, 1955, that "This court does not file a separate document called judgment. The opinion and the minute entry thereon constitute the judgment. * * * There is no *separate judgment.* The minute entry order based on the opinion *is* the judgment * * * ." [Emphasis in original.]

Accordingly, there is set out below the minute entry order in each case.

(a) Navajo County Case

April 21st 1955: No. 5975

Aztec Land & Cattle Co., appellant,

Vs—

Navajo Realty Co. et al, appellees

This case having been heretofore submitted, and the Court having duly considered same and being advised in the premises, now files its opinion. It is accordingly ORDERED that "that portion of the judgment directing a peremptory writ of mandamus issue to Aztec requiring it to list that portion of the lands described therein which it claims or owns, is ORDERED stricken, and the peremptory writ issued pursuant thereto to Aztec is ORDERED quashed. In all other respects the judgment of the trial court is affirmed.

(b) Coconino County Case

April 21st, 1955.

Cecil McCormick et al, appellants— No. 5929

vs

Aztec Land & Cattle Co., et al, appellees.

This case having been heretofore submitted, and the Court having duly considered same and being now advised in the premises, files its opinion. It is accordingly ORDERED that the judgment of dismissal is reversed; the amended complaint is ORDERED reinstated along with the alternative writ of mandamus as to the County Assessor, and the cause remanded for further proceedings not inconsistent with the court's holdings in these matters.

APPENDIX C

EXCERPTS FROM THE RECORD SHOWING RAISING OF THE FEDERAL QUESTION

The numbering of the items follows the order set forth in the Petition, pp. 12-15, *supra*.

(a) Navajo County Case

(i) ANSWER OF DEFENDANT AZTEC LAND AND CATTLE COMPANY (NR. 13)

* * *

IV

Answering Paragraph III of plaintiffs' complaint, this defendant denies each and every allegation therein contained, and alleges that the record title to all of the property described in said Paragraph III is in the United States of America.

(ii) PLAINTIFFS' AMENDED COMPLAINT (NR. 18)

* * *

III

The Aztec Land and Cattle Company, Limited, is the owner of certain lands situated in Navajo County, Arizona, which were acquired on November 7, 1905, by deed from the Santa Fe and Pacific Railroad Company, which latter company acquired said lands as a portion of a Railroad Land Grant from the United States Government dated July 27, 1866, and which lands are particularly described as follows: * * *

(iii) PLAINTIFFS' REPLY TO ANSWERS OF ALL DEFENDANTS (NR. 22-24)

* * *

III

Paragraph III of the Complaint, alleging that defendant Aztec Company is the owner of certain lands described in

said paragraph, is denied by all defendants, which denials are qualified by reference to record title.

Plaintiffs allege that the status of ownership of said lands has been adjudicated by the United States District Court for the District of Columbia, the findings, conclusions of law and Judgment of which Court is attached hereto, marked "Exhibit A" and made a part of this reply.

Said District Court Judgment was affirmed by the United States Circuit Court, District of Columbia Circuit, on November 15, 1951, (198 Fed. 2nd 498) and on June 2, 1952, a Writ of Certiorari for the purpose of reviewing said Circuit Court's decision was denied by the United States Supreme Court (72 U. S. 1058) thereby rendering said District Court Judgment forever final.

Plaintiffs further allege that the United States Department of the Interior is holding in trust for defendant, Aztec Company, all money received from sales of timber and other resources from said lands since the year of 1942; that a bill is now pending in the United States Congress authorizing the Department of the Interior to accept the Aztec Company's deed to said lands and to pay for same including said trust funds. A copy of said bill is attached hereto, marked "Exhibit B" and made a part of this reply.

(iv) Plaintiff's Motion for Summary Judgment

(NR. 29-30)

• • •

In support of this motion plaintiffs are filing and present herewith the following documents:

1. A certified copy of the Findings, Conclusions of Law and Final Judgment of the United States District Court for the District of Columbia, marked "Plaintiffs' Exhibit A."

2. By reference, and of which the Court will take judicial notice, the published decision of the United States Circuit Court, District of Columbia Circuit, Affirming the said District Court, the case of Santa Fe Pacific, etc. vs. Chapman, et al, 198 Fed. 2nd, 498.

3. A certified copy of a Bill of the Senate of the United States, marked "Plaintiffs' Exhibit B."

* * *

(v) AFFIDAVIT SUPPORTING MEMORANDUM IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT (NR. 31-36)

* * *

T. W. CABEEN, having been first duly sworn, on oath states:

That he is a vice president of AZTEC LAND AND CATTLE COMPANY, a corporation, one of the defendants in the above numbered and entitled cause; that he is the officer of said company in direct charge of operations thereof in the State of Arizona; that he is familiar with the contents of the books and records of said company and is competent to testify to the facts contained in this affidavit; * * *

Affiant states that defendant Aztec Land and Cattle Company is not the owner of the lands in controversy, but, on the contrary, alleges that the legal title is vested in the United States of America and said lands are under the sole supervision and control of the United States Forest Service of the Department of Agriculture.

Affiant further states that said Aztec Land and Cattle Company has made application for patents to the land in question pursuant to the right to take such action established in the case of Chapman vs. Santa Fe Railway Company, 198 Fed. 2d 498; that no patents have issued pursuant to such application and no title has vested in said defendant and no title can vest in said defendant until there has been a determination by the United States

Department of the Interior of the following matters and things, to wit:

(a) That the lands, the subject of the above mentioned application for patent, are non-mineral in character.

(b) That there are no valid prior claims of others pre-empting said lands or a portion thereof.

Affiant further states that the records of defendant Aztec Land and Cattle Company show that as of February 4, 1954, the requirements of the Act of Congress of July 27, 1866 (14 Stat. 292) relating to a mineral survey of said lands had not been complied with, and that pursuant to the provisions of the Act, no title can issue to said defendant until the establishment of the non-mineral character of said lands.

Affiant further states that many claims have been filed with the Bureau of Land Management of the United States Department of the Interior, showing or purporting to show title to portions of said land, all of said claims being in opposition to said defendant's application for patent; and that said claims and the validity thereof must be adjudicated before the United States Department of the Interior, Bureau of Land Management, before a patent can issue.

Affiant further states that the claim to said lands of defendant Land and Cattle Company have been in dispute, controversy and litigation from 1886 until 1952; that during that entire period said defendant has been and now is excluded from the possession of said lands; and that possession, ownership and title has been claimed for the United States by the United States Department of the Interior or the United States Forest Service of the Department of Agriculture.

That during said period the United States, through said agencies of government, has acted in all respects as the owner of a fee simple title to said lands, has leased said

lands to others for grazing purposes and has sold therefrom a valuable crop, to wit, Ponderosa Pine timber, and has kept all of the proceeds of said leases and sales, except such portion thereof as have been remitted to the Counties of Navajo and Coconino in lieu of taxes; that affiant is informed and believes and, therefore, alleges that the amount and value of the timber sold to others from said lands is between $500,000.00 and $1,000,000.00, and that additional large sums have been realized from the leasing or permitting of grazing rights thereon.

That the books and records of said Aztec Land and Cattle Company show that notwithstanding defendant's claim to said lands as evidenced by its application for patent, the title, ownership, and right of possession and use thereof has never been vested in it, but that the same is now the subject of dispute between said defendant, the United States through its agencies and departments, and the several claimants to portions of said land who have filed protests to the application for patent of said defendant.

T. W. CABEEN

Subscribed and sworn to before me this 26th day of February, 1954.

MARGARET M. SCOTT
Notary Public

(vi) DECISION OF SUPERIOR COURT, MARCH 17, 1954 (NR. 42-50)

The plaintiffs' Motion for Summary Judgment having been submitted to the Court for decision, and the Court taking into consideration the legal and historical data concerning title to the lands in question and being fully advised in the premises, is of the opinion that Aztec Land & Cattle Company, one of the defendants in this cause, has an ownership in and to said lands which is taxable under Arizona law.

The Court's conclusion is evidenced and sustained by the law, the Motion for Summary Judgment, and the affidavits and controverting affidavits of the parties. The pertinent points supporting the Court's conclusion are summarized as follows:

(1) The lands in question were first granted to the Atlantic and Pacific Railroad Company (hereafter referred to as the Atlantic and Pacific) by Act of Congress dated July 27, 1866, which act is reported in 14 Stat. 292.

(2) On March 12, 1872, the Atlantic and Pacific filed with the Secretary of the Interior a map of definite location and the rights to the lands granted became fixed and determined.

(3) On February 3, 1866, the Atlantic and Pacific contracted to sell the lands in question to the Aztec Land & Cattle Company (hereinafter referred to as the Aztec Company). A consideration of $500,000.00 was paid for these and other lands.

(4) By Act of Congress dated March 3, 1897, c 374, 29 Stat. 622, Santa Fe Pacific Railroad Company, a corporation (hereinafter referred to as the Santa Fe) was created.

(5) On June 2, 1897, a Special Master and others acting in behalf of the Atlantic and Pacific conveyed to the Santa Fe all rights and interests in the lands in question, which conveyance was recorded in the Office of the County Recorder, Navajo County, Arizona, on July 29, 1897, in Book 1 of Deeds, pages 343 to 355 inclusive.

(6) On November 7, 1905, Santa Fe as successor to Atlantic and Pacific, conveyed to Aztec Company the lands involved in this cause, which deed was recorded in the Office of the County Recorder of Navajo County, Arizona, on February 12, 1906, in Book 4 of Deeds, pages 228-295, inclusive.

(7) At first, that is after the Act of Congress dated July 27, 1866, no surveys were made which would have enabled the Santa Fe to make selections, and it was during this time that said lands were withdrawn as a part of the forest reserve by Presidential Proclamation. However, said Proclamation was declared void in 1940 by the U. S. Supreme Court, 311 U. S. 317, *United States* v. *Northern Pacific Railway Co.*

(8) The Aztec Company has raised a question in this case as to lack of surveys and selections being made by the Atlantic and Pacific and the Santa Fe, the Aztec Company's predecessors in interest. The United States Court of Appeals, in the case of *Santa Fe, et al.* v. *Secretary of the Interior, et al.*, reported in 198 Fed. 2d 398, answered this question favoring the proposition that no selections were necessary to vest title in said land in the Santa Fe. The following is an excerpt from the opinion on these points:

[Here followed a quotation from the opinion, setting forth the last three paragraphs on p. 501 of 198 F. 2d.]

(9) Sections 73-201, 202 ACA 1939 set forth the nature and quality of all property subject to taxation and specifically defines the term "real estate" to include the *ownership of, or claim to,* or possession of, *or right of possession to,* any land, and the law further states that it is the duty of the county assessor to assess property of this character to its owners.

(10) Title 43, Section 882, U. S. Code Annotated, provides that no lands granted to a railroad corporation by Act of Congress shall be exempt from taxation by the States because no patent has been issued therefor, providing the lands are surveyed.

(11) Finally, it was held in effect by the United States Court of Appeals, 198 Fed. 2d 498, that the title to the

lands in question is vested in the Aztec Company, and further in that case the Court said:

"The only duty which the Secretary must perform is purely ministerial. He need only issue the patents. Consequently we do not hesitate to grant mandamus and injunctive relief."

The defendant, Aztec Company contends that it does not have possession, control, or ownership of these lands even in the face of a Judgment of the United States Court giving it ownership, which Judgment further decreed that the Santa Fe did have a right in said lands which it could and did (198 F. 2d 501) sell to the Aztec Company. The said Judgment in that case granted mandamus making it mandatory that the Secretary of Interior issue patents to the Aztec Company. While the Aztec Company claims no title to these lands, it does allege application for patents has been made. The Judgment having commanded the Secretary of Interior to issue patents covering the lands in question, the making of application for patents is, therefore, not a condition precedent to the issuance of patents. If patents have not issued, said defendant, Aztec Company, should avail itself of the legal remedy provided by law and cite the Secretary of Interior into the Federal Court to show cause why he should not be held in contempt for failing to comply with the Court's Order.

Inference from the record before this Court discloses that the receipts from said lands and timber resources are in a special deposit account. This in itself indicates that the government recognizes ownership in the Aztec Company.

The legal status of said lands has been a highly controversial question for over half a century, with the government on one side and the Santa Fe and Aztec Company on the other, and for many years past this matter has actually been in the Courts. The policy of the law is that

there should be an end to litigation. As the title to said lands has heretofore been tested and the United States Courts have spoken resolving this question of title in favor of the Aztec Company, the Court concludes said lands are taxable and should be assessed to the Aztec Company on the tax rolls of Navajo County, Arizona.

Therefore, upon presentation of a formal written Judgment and its approval and signing, a peremptory writ of mandate in due form of law will issue directing the defendants, Aztec Land & Cattle Company and Arthur Palmer, as County Assessor of Navajo County, to list and assess the lands described in the complaint less the lands set forth in assessor's certificate filed herein to the Aztec Land & Cattle Company, as provided by law.

Done in Open Court this 17th day of March, 1954.

DON T. UDALL
Judge of Superior Court.

(vii) MOTION TO VACATE JUDGMENT (NR. 60-64)

COMES Now defendant Aztec Land and Cattle Company, hereinafter referred to as Aztec, and respectfully moves the Court to vacate and set aside the final judgment entered against it in this cause on the 22nd day of March, 1954, and to quash the peremptory writ of mandamus issued pursuant to said judgment, and to enter an order denying plaintiffs' Motion for Summary Judgment on the following grounds:

* * * * *

2. That the Court misconstrued the final judgment of the U. S. District Court for the District of Columbia, in Civil Action No. 23477, entitled "Santa Fe Pacific Railroad Company, a corporation, and Aztec Land and Cattle Company, Ltd., a corporation, vs. Julius A. Krug, Secretary of the Interior, et. al.," a certified copy of which is attached to

this motion, marked "Exhibit A" and by this reference made a part hereof, and the holding of the Court of Appeals for the District of Columbia in the case of *Chapman* vs. *Santa Fe Pacific Railroad Company, et. al.*, 198 Fed. 2d 501, affirming said District Court judgment, in that this Court construed that said cases granted a writ of mandamus commanding the Secretary of the Interior to issue patents to Aztec for the land involved in this litigation, and that the question of *title* to said lands had been resolved in favor of Aztec, when in fact the relief granted by the District Court and affirmed by the Court of Appeals enjoined the Secretary of the Interior from rejecting the selection by Santa Fe of certain lands for its purchaser Aztec, on the specific grounds therein set forth, and directed the Secretary, by a writ of the nature of mandamus, to proceed to determine the right of Santa Fe and Aztec to have patented said lands.

It further appears from the affidavits attached to Aztec's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment that pursuant to said judgment, the defendant Aztec did make application for patents, but that said application has not been determined, in that no mineral survey has been completed as required by the Act of July 27, 1866, and the rights of entrants on said land have not been determined.

It is submitted that in the event and to the extent that the lands are determined to be mineral in character, or that the lands have been pre-empted by entry, defendant Aztec cannot become the owner of said lands, which ownership remains in the United States until the issuance of patents.

* * * * *

4. That the pleadings, affidavits and file in this action show without dispute that the legal title to said lands is in the United States of America, and this fact prima facie determines both the right and fact of the ownership. *Wisconsin Railroad Company* vs. *Price County*, 133 U. S.

498. No affidavits or evidence have been presented to the Court to overcome this.

* * * * *

(viii) OPINION OF THE SUPREME COURT OF ARIZONA.

Set out *supra*, pp. A1-A15.

(b) Coconino County Case

(i) ANSWER OF DEFENDANT AZTEC LAND AND CATTLE COMPANY (CR. 25)

* * * * *

IV.

Answering Paragraph III of plaintiffs' complaint, this defendant denies each and every allegation therein contained, and alleges that the record title to all of the property described in said Paragraph III is in the United States of America.

(ii) PLAINTIFFS' REPLY TO ANSWER OF AZTEC LAND AND CATTLE CO. (CR. 28-29)

* * * * *

III.

Paragraph III of the Complaint, alleging that defendant Aztec Land and Cattle Company is the owner of certain lands described in said paragraph, is denied by defendant, Aztec Land and Cattle Co., which denial is qualified by reference to record title.

Plaintiffs allege that the status of ownership of said lands has been adjudicated by the United States District Court for the District of Columbia, the findings, conclusions of law and Judgment of which Court is attached hereto, marked "Exhibit A" and made a part of this reply.

Said District Court Judgment was affirmed by the United States Circuit Court, District of Columbia Circuit, on November 15, 1951, (198 Fed. 2nd 498) and on June 2, 1952,

a Writ of Certiorari for the purpose of reviewing said Circuit Court's decision was denied by the United States Supreme Court, (72 U. S. 1058) thereby rendering said District Court Judgment forever final.

Plaintiffs further allege that the United States Department of the Interior is holding in trust for defendant, Aztec Company, all money received from sales of timber and other resources from said lands since the year of 1942; that a bill is now pending in the United States Congress authorizing the Department of the Interior to accept the Aztec Company's deed to said lands and to pay for same including said trust funds. A copy of said bill is attached hereto, marked "Exhibit B" and made a part of this reply.

(iii) PLAINTIFFS' AMENDED COMPLAINT (CR. 50)

* * * * *

II.

* * * The Aztec Land and Cattle Company, Limited is the owner of certain lands, situated in Coconino County, Arizona, which were acquired on November 7, 1905, by deed from the Santa Fe and Pacific Railroad Company, successor of the Atlantic and Pacific Railroad Company, which latter company acquired said lands as a portion of a Railroad Land Grant from the United States Government dated July 27, 1866, and which lands are particularly described as follows: * * *

(iv) OPINION OF THE SUPREME COURT OF ARIZONA.

Set out *supra*, pp. A16-A18.

APPENDIX D

STATUTES INVOLVED

1. Section 73-202, Arizona Code, 1939, Annotated, provides in pertinent part as follows:

> **73-202. Real estate and personal property defined—Each item liable—Land liable for improvements.**—In this chapter [Taxation], the term "real estate" shall mean and include the ownership of, or claim to, or possession of, or right of possession to, any land or patented mine.
> • • •

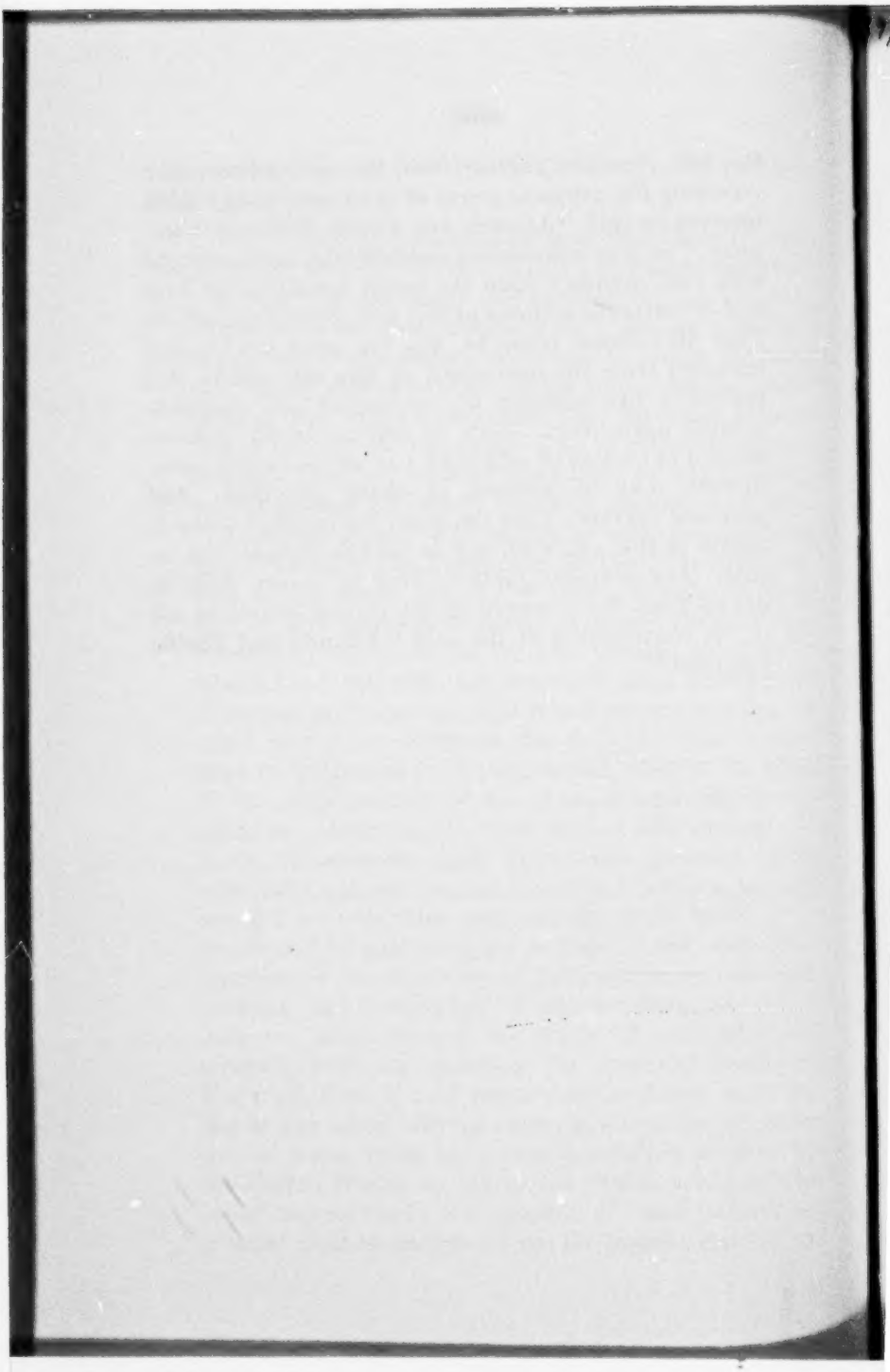
2. 43 U. S. C. § 882 (Sec. 1 of the Act of July 10, 1886, c. 764, 24 Stat. 143) provides as follows:

> **§ 882. Surveyed lands taxable notwithstanding lien; provisos.** No lands granted to any railroad corporation by any Act of Congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: *Provided,* That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands: *Provided further,* That sections 882 to 885, inclusive, shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties: *Provided further,* That at any sale of lands under the provisions of sections 882 to 885, inclusive, the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto.

3. Section 3 of the Act of July 27, 1866, c. 278, 14 Stat. 292, is as follows:

SEC. 3. *And be it further enacted,* That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by said homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided,* That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by

this act: *Provided further,* That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further,* That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further,* That the word "mineral," when it occurs in this act, shall not be held to include iron or coal: *And provided further,* That no money shall be drawn from the treasury of the United States to aid in the construction of the said "Atlantic and Pacific Railroad."



Office - Supreme Court, U. S.
FILED
OCT 3 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner,*

v.

NAVAJO REALTY COMPANY, CECIL MCCORMICK, *Et Al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner,*

v.

NAVAJO REALTY COMPANY, CECIL McCORMICK, *Et Al.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

POINTS IN OPPOSITION

The petition to this Court for a Writ of Certiorari to review the record before the Supreme Court of Arizona in the above entitled cases should be denied on the following grounds:

I

The Petition presents no substantial federal question in that the decision of the Arizona Supreme Court interpreted state statutes relating to matters of local law and procedure.

II

The statement of the "Question Raised" in Petitioner's Brief

presents an erroneous and misleading conclusion as to the effect of the decision sought to be reviewed, in that the decision does not sustain the levy and collection of a tax on the lands in question, but instead, determines that under the Arizona statute the lands are required to be placed on the tax rolls of the state, a condition precedent to assessment and levy.

III

The decision on which review is sought has become moot, in that patents have been issued to substantially all of the land in question, and such patented land has been returned to the state tax rolls by Petitioner, notwithstanding the stay of execution issued by this Court at Petitioner's request.

IV

The Arizona Supreme Court determined whether Petitioner had an interest in land taxable by the state and in so determining it gave effect to prior United States Court judgments which foreclose reliance on such question as a grounds for jurisdiction on review by this Court.

V

That the Petition for Writ submits as its ground for jurisdiction argument on the merits of an issue as to a state tax assessment and collection which has not been made and upon which no proceedings have been had in any Arizona court or before any administrative agency.

STATEMENT OF THE CASE

Respondents being dissatisfied with the presentation of Petitioner of jurisdictional matters, including the federal question raised, it is deemed necessary to make a brief statement in accordance with the privileges granted in Rule 40(3).

The two cases sought to be reviewed arose in Arizona trial

courts when taxpayers' complaints for mandamus were filed against petitioner, hereinafter referred to in the alternative as Aztec, and officers of Navajo and Coconino counties to require listing on the tax rolls of the two counties of approximately 98,000 acres of land. The actions in the state courts were a direct consequence of two United States Court decisions: *Krug v. Santa Fe Pac. R. Co.*, 81 U.S. App. D.C. 288, 158 F.2d 317, and more particularly, *Chapman v. Santa Fe Pac. R. Co.*, 90 U.S. App. D.C. 34, 198 F.2d 498, certiorari denied, 343 U.S. 964, 72 S. Ct. 1058, 96 L. Ed. 1361.

The Arizona Supreme Court summarized the proceedings in *Aztec Land and Cattle Co. v. Navajo Realty Co., et al*, 79 Ariz. ———, 283 P.2d 227 at 228 (P.B., p.A3), as follows:

> ". . . The complaint alleges that Aztec is the owner thereof, which the latter in its answer denies, asserting that the record title is in the United States of America; however, in its reply plaintiffs allege that the ownership of these 'indemnity strip' lands as between the government and Aztec was adjudicated . . . (citing the *Krug* and the *Chapman* cases brought in the name of Santa Fe, grantor to Aztec) Hence it is plaintiffs' position that the question of ownership is one of law which the trial court was empowered to decide on motion for summary judgment. A determination of whose position is correct is, we believe, the crux of the whole case." (Explanation supplied)

The Navajo Realty case was appealed by Aztec from the order of the trial court requiring that the land in Navajo County be placed on the tax rolls. In the Coconino county case, Aztec's motion to dismiss was granted, and plaintiffs appealed. This companion case was decided by the Arizona Supreme Courts as *McCormick v. Aztec Land & Cattle Co., et al*, 79 Ariz.———, 283 P.2d 234, in accordance with the ruling in *Aztec v. Navajo Realty Co.*, supra.

The holding of the Arizona Supreme Court was essentially:

1. There was no dispute as to material issues of facts; therefore, summary judgment was appropriate.

2. That the statutes of Arizona subjected to taxation a "claim to" any land.

3. That the validity of Aztec's "claim to" the land in question had been determined by United States Courts and that such determination warranted placing the land on the tax rolls in that Aztec held equitable title. That legal title had not passed from the United States (at the time of the decision) because patents had not yet been issued, but that the issuance of patents was a ministerial duty which the Secretary of the Interior would perform.

Upon these holdings Petitioner seeks certiorari. It obtained orders staying enforcement of the Arizona decisions on June 2, 1955, but reveals at page 20 of its brief that it nevertheless has returned substantially all of the land in question to the tax rolls. The two sections of the Arizona tax code determinative of the result reached, follows:

Section 73-201, ACA, 1939, " . . . all property shall be subject to taxation, except:" (then are enumerated classes of property, including federal property, not subject to taxation.) (P.B. A33).

Section 73-202, ACA, 1939, " . . . In this chapter (Taxation) the term 'real estate' shall mean and include the ownership of, or a claim to, or possession of, or right of possession to, any land or patented mine. . . . "

STATEMENT OF OPPOSITION

I

FEDERAL QUESTION

The petition presents no substantial federal question in that the decision of the Arizona Supreme Court interpreted state statutes relating to matters of local law and procedure.

Petitioner invokes jurisdiction "under the provisions of 28 U.S.C.A. §1257(3)." It fails to precisely state which federal question is raised under §1257(3), nor did it set out a specific federal question in the pleadings below. Such specification, unless the question may fairly be drawn from the intendment of the pleadings, is required by this court. *Armstrong v. Athens Co.*, 16 Pet. 281, 10 L.Ed. 965. An examination of Petitioner's brief (pages 12-15) shows no specific ground under §1257 with respect to the decisions sought to be reviewed. The Petitioner merely asserts that:

> "The opinion of the Supreme Court of Arizona shows on its face that it rests on federal grounds." (P.B. 14)

If the federal question raised in the trial court was that title to the lands in question was in the United States and they were not subject to state taxation, then such question was without substance, in that ownership of the lands in Aztec had previously been adjudicated, and upon such determination this Court had denied certiorari; *Chapman v. Santa Fe Pac. R. Co.*, supra. Petitioner contends such determination misconstrues a United States Court decision.

By what fair intendment may Petitioner now say that any title, right, privilege or immunity is especially set up or claimed under the constitution, treaties or statutes of the United States? Certainly the Petitioner is not claiming title under the United States, because it denies title; nor is the Petitioner claiming immunity in behalf of the United States from state taxation, for there is no showing that it is authorized to represent or plead in behalf of the United States, even if such plea were not precluded by prior adjudication.

Although the precise federal question upon which Petitioner seeks to invoke jurisdiction is clouded by failure to specify, it must be assumed it is in some way tied in with the state Court's finding that petitioner had a taxable interest in the land in question. If that be the essence of the question, then such question is not sufficient to invoke jurisdiction of this Court for the reason

that it is a local question, to be answered by the law of the forum. In *Nickel v. Cole,* 256 U.S. 222 at 226, Mr. Justice Holmes said:

> "As there was state power to tax . . . the question whether or not the . . . interest (of the plaintiffs in error) under the circumstances was correctly subjected to the tax was a purely state question. *Moffitt v. Kelly,* 218 U.S. 400, 405."

In addition to deciding whether petitioner had taxable interests in land, all other points determined by the Arizona Supreme Court pertain to matters of procedure.

Petitioner appealed to the Supreme Court of Arizona on the ground that summary judgment against it was improper because of the existence of genuine issues of material fact between the parties. The Arizona Court held there were no issues of fact, that only questions of law were raised by the pleadings, that, therefore, summary judgment was proper.

The rule is too well known to require citations that this Court will not review a state Court's determination of a procedural matter nor its interpretation of local statutes. Nevertheless, Petitioner seeks a review of such a decision and in support of its claim to jurisdiction completely misstates the question raised by the state decision.

II

PETITIONER'S "QUESTION RAISED"

The statement of the "question raised" in petitioner's brief presents an erroneous and misleading conclusion as to the effect of the decision sought to be reviewed, in that the decision does not sustain the levy and collection of a tax on the lands in question, but instead, determines that under the Arizona statute the lands are required to be placed on the tax rolls of the state, a condition precedent to assessment and levy.

Petitioner states the question to be: (P.B.2)

"Whether a state may assess a tax against a private corporation in respect of lands which, *at the time of the assessment,* had not yet been patented to it by the United, . . . " (Emphasis supplied)

With respect to the time of the assessment, that time has not yet come. The Arizona Supreme Court did not assess state taxes upon the land in question, nor did it attempt to do so, nor has anyone else up to this moment assessed taxes upon the land, nor can this be done until the property is placed upon the tax rolls. All that the Arizona Court ordered was that the property be placed upon the tax rolls.

The listing of property on the tax rolls is a condition precedent to its assessment and the levy of taxes thereon. All that has been done is to order the property listed. At such time as the property is placed upon the tax rolls, then the two assessors in the two counties in which the land lies will determine its valuation for tax purposes; thereafter, a tax rate will be determined by various local and state officials and thereupon, county treasurers will proceed to collect the tax. No tax has been assessed, levied nor attempted to be collected. This Court may judge for itself the propriety of petitioner's statement of "Question Presented" and the accuracy of its statement that:

" . . . Yet under the rationale of the rulings now sought to be reviewed, petitioner must pay taxes on all of these tracts back to 1949, or even farther back, a time when its right thereto was still being bitterly contested by the United States." (P.B. 15)

Argument in that vein in the following pages of the brief, throughout the entire brief as a matter of fact, attempts to persuade this Court to review something that has not yet been litigated below.

The injury petitioner claims to have suffered by deprivation of

"rights, privileges, or immunities under the constitution or the statutes of the United States" as expressed in its statement of the "Question Presented" has not yet occurred, nor has the protection of the Arizona courts been denied petitioner against what it assumes to be threatened injury. Petitioner expresses fear of what may happen in the future. This Court will not decide a constitutional question in advance of the necessity for its decision. It is said in *Asbury Hospital v. Cass Co.*, 326 U.S. 207 at 213:

> "We are thus asked to pass on the constitutionality of a possible application of the state statute in advance of its application to appellant, and of its authoritative construction by the state courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. (citing cases)"

III

DECISION MOOT

The decision on which review is sought has become moot, in that patents have been issued to substantially all of the land in question, and such patented land has been returned to the state tax rolls by Petitioner, notwithstanding the stay of execution issued by this Court at Petitioner's request.

Petitioner's admission in its brief indicates that even though it obtained a stay of execution from this Court it nevertheless has complied with the order of the Arizona Supreme Court. Petitioner's compliance with the Arizona order is indicated at page 20 of its brief, as follows:

"Subsequent to the issuance of patents, petitioner duly returned the patented land for taxation."

How nearly completely this entire matter has become moot is demonstrated by the statement at page 12 of the brief, wherein the Petitioner recites the action taken by the Bureau of Land Management, pursuant to the *Chapman* decision, showing:

" . . . that on January 11, 1955, a patent issued to the Railroad Company for 5,619.96 acres of the land as selected, and another on March 25, 1955, for an additional 87,847.86 acres; and that patent for the balance of the lands due, estimated as involving between 1500 and 2100 acres, has not yet been issued as of the date of the filing of this Petition."

The Arizona Supreme Court was aware of this progress under the *Chapman* decision, stating: (P.B. A11)

"As proof of Aztec's fear that patents would not be forthcoming was more fanciful than real was the admission made at time of oral argument that a short time prior thereto the first of these patents, covering some 5,000 acres, had been received."

No more need be said on this point than to remember the statement of Mr. Justice Jackson in *Doremus v. Board of Education,* 342 U.S. 429, 433:

"Obviously no decision we could render now would protect any rights she may once have had, and this Court does not sit to decide arguments after events have put them to rest. *United States v. Alaska S.S. Co.* 253 U.S. 113, 116, 65 L.Ed. 808, 810, 40 S.Ct. 448."

IV

PRIOR DECISIONS GIVEN EFFECT

The Arizona Supreme Court determined whether Petitioner had an interest in land taxable by the state and in so determining it gave effect to prior United States Court judgments which foreclose reliance on such question as a grounds for jurisdiction on review by this Court.

When there is set up in a state court a judgment of a federal court, awarding property or rights in property, and the effect of such judgment is denied in the state court, then a claim to a federal right arises which will be protected by this Court. Here to the contrary. The effect of prior federal judgments awarding a claim to land is relied upon and given effect by the state court in determining that the successful claimant in federal court has a taxable interest in the land under state law. The prior judgments of this Court preclude Petitioner from denying the claim to land, and the consequent taxability of such interest being reviewed by this Court.

When the questions presented are found, in view of previous decisions of this Court, to be so wanting in substance as to preclude further argument jurisdiction is denied. *City of Boston v. Jackson,* 260 U.S. 326, 43 S.Ct. 129; *Missouri Pacific R. Co. v. Castle,* 224 U.S. 541, 544, 32 S. Ct. 606, 56 L.Ed. 875.

Central Pac. R. Co. v. Nevada, 162 U.S. 512, 16 S. Ct. 885, 40 L.Ed. 1057, relied upon by the Arizona Supreme Court, together with the *Krug* and *Chapman* cases plainly forecloses the federal question Petitioner seeks to raise.

V

PETITIONER'S ARGUMENTS ON MERITS

That the Petition for Writ submits as its ground for jurisdiction argument on the merits of an issue as to a state tax assessment and collection which has not been made and upon which no proceedings have been had in any Arizona court or before any administrative agency.

Petitioner proceeds in strange ways to invoke jurisdiction. In addition to proposing as the question for decision of this Court something outside the scope of the state Court's holding, there is

submitted in the brief extensive argument on the merits of a tax levy that has not yet been made.

Petitioner purports to limit its complaint to an objection to taxation prior to issuance of patents to the land, which it conceives to be the first moment when it has "acquired full beneficial ownership" (P.B. p.15: "The ruling of the Arizona Supreme Court improperly subjects Petitioner to taxation in respect of property which it neither owned or possessed prior to issuance of patent, . . . " P.B. p. 20: "All that Petitioner asserts here is that it cannot be legally assessed state taxes before then, . . . ")

Even if this were a case of a tax levy improperly made, and as such it involved more than a determination of state law, and that the existence of a substantial federal question such as due process or other cogent ground was properly raised below, then, even upon all of these assumptions, a review on the merits is not warranted, because the question thus raised has been foreclosed by earlier decisions of this Court.

This Court, on numerous occasions, has held that when equitable title to federal land passes to a person, the land becomes subject to state taxation. *Irwin v. Wright,* 258, U.S. 219, at 229 and cases there cited.

Petitioner urges the existence of a substantial federal question in much the same manner as in *Montana Catholic Missions v. Missoula County,* 200 U.S. 118. There the Petitioner in error, holding legal title to land, claimed to be exempt from state taxation on the ground that the beneficial use or beneficial ownership of the land was in an Indian tribe and the land was therefore not subject to taxation by the state.

Aztec reverses the position of the Montana Missions and points to legal title in the United States with a denial it had beneficial ownership. Its denial is in the face of the statement in the Montana Missions case that:

" . . . And one is also said to have the beneficial ownership of land who has done everything to entitle him to a patent from the government, and who, therefore, has the legal right to such patent, and all that remains to be done is for the proper officer to issue it. *Wisconsin C.R. Co. v. Price County,* 133 U. S. 496, 33 L.Ed. 687, 10 S.Ct. Rep. 341; *Central P. R. Co. v. Nevada,* 162 U.S. 512, 40 L.Ed. 1057, 16 S.Ct. Rep. 885. In such case the land is taxable to such owner, though he has not the legal title. . . . "

Let us now see what the Arizona Supreme Court said as to equitable title and ownership in Aztec. At 283 P. 2d 227, 230, we find:

"(2) Considering the pleadings, affidavits and exhibits in the instant case, as well as the federal decisions in the Chapman and Krug cases, which have to do with the particular lands here involved, can it be said that there is any genuine issue as to any material facts or was the trial court correct in its holding that plaintiff was entitled to judgment as a matter of law? Let us test each of the purported factual issues which Aztec claims to exist.

(a) As to the matter of ownership of the lands in question: it is our firm opinion that the Chapman decision, properly construed, unequivocally establishes, as a matter of law, Aztec to be the equitable owner of said realty."

A look at the holding in the *Chapman* case requires an inspection of the *Krug* decision. From the two may be determined what rights, if any, Aztec acquired. Be it remembered that if the rights consisted of a valid "claim to" land, regardless of legal title, possession or use, the interest is within the Arizona taxing statute. The *Krug* case discloses Santa Fe conveyed, for half-a-million dollars, all its interest in the land in question to Aztec.

From the decision itself we learn what those interests are. At 158 F. 2d 317, 320, the Court said:

" . . . Accordingly, we think that, in the circumstances

described in the complaint, — if proved on the trial — the lands here involved are identified without the formality of selection, as the result of which the right of Santa Fe attached and the issuance of patents became a duty of the Secretary of the Interior. (citing cases)"

The Court pointed to the Transportation Act of 1940 (54 Stat. 954, 49 U.S.C.A. §65 to indicate what rights in this land Aztec had. It said at 158 F. 2d 317, 318:

" . . . The purpose of the Act was to relinquish the existing right of the United States to reduced rates on property carried for the Government by land grant railroads and in return to secure the release by the railroads of all their existing *rights to lands or interest in lands granted to them,* but as to which title had not then passed. The Act, however, provided:

" 'Nothing in this section shall be construed . . . to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value . . . .' " (Emphasis supplied)

The Santa Fe having sold to Aztec, an innocent purchaser, the Court held it was not necessary a selection be made and that the Secretary of the Interior was under a duty to issue patent to Aztec.

This interest in Aztec and this duty of the Secretary of the Interior, which was confirmed in the *Chapman* case, was sufficient to warrant placing the land on the tax rolls so that it would be subject to taxation.

These proceedings show that Aztec blew hot in federal court, as to its claim to the land, and cold in state court without challenging the constitutionality of the Arizona taxing statute. Aztec now contends that it is not taxable under that statute until patents have been issued to it.

Consistency may not be a jewel, but Aztec has taken diametrically opposed positions in successive law suits. It speaks with two

tongues, one in defense of its claim to the land, and the other to deny its claim to the land.

Aztec disavows any subtleties as to " 'title', 'equitable interest', or the like:" (P.B.20). Nevertheless it devotes its arguments to these "niceties."

In its brief Aztec recognized the questions of law involved, but attempts by means of repeated embellishment of the "Question Presented" to sustain its argument upon the merits of the decision it lost below. It refers (P.B. 10) to the statement of the Arizona Court" . . . That the issuance of a patent was not a prerequisite to state taxation, . . . ", and concedes (P.B. 19) " . . . that the retention of bare legal title in the United States is not material. . . . " It disputes this concession at page 15 of its brief, where it contends that until it obtains a patent, it "neither owned or possessed" the land and having neither owned nor possessed the land, because it did not have patent when the case arose, it complains that under the Arizona decision it " . . . must pay taxes on all of these tracts back to 1949, or even farther back, . . . ".

Petitioner's admission that land is taxable by a state when equitable title has passed, (P.B. 16) is qualified by the statement that equitable title passes " . . . by approval of the selection list or issuance certificate, . . . ". Although those conditions may well apply to conditions set forth in the decisions cited, nevertheless, they are not applicable to this case, because the argument ignores the fact that neither of those conditions are required here. The ruling in the *Chapman* case eliminates necessity for " . . . approval of the selection list . . ".

The Arizona Supreme Court held that Petitioner had a taxable title, equitable or otherwise, in the lands in question as result of the *Chapman* decision which held: " . . . no selection was necessary to vest title in the Santa Fe. . . . " (198 F.2d 498, 501). Nor was the issuance of a certificate under the Homestead and Reclamation Acts involved in this case, as was true in *Irwin*

v. Wright, supra, because the Court in the *Chapman* case said, at 198 F.2d 498, 502:

> " . . . The only duty which the Secretary must perform is purely ministerial. He need only issue the patents. Consequently, we do not hesitate to grant mandamus and injunctive relief."

An examination of the Arizona decision shows that the Court, very carefully, point by point, considered the same arguments Petitioner is now making on the merits of the case and rejected them as having been foreclosed by decisions of this Court. The separately lettered paragraphs in the Arizona decision on each of "the purported factual issues," Petitioner claimed to exist, are set forth commencing at page A7 of Petitioner's Brief.

Paragraph (a), deals with the crucial question whether, as a matter of law, Petitioner owned the land even though it did not hold legal title at the time the suit was commenced. As to this the Arizona Court said, " . . . it is our firm opinion . . . , as a matter of law, Aztec . . . (is) the equitable owner of said realty."

Paragraph (b), rejects the argument of petitioner that its rights to the land were lost by executive withdrawal from entry as " . . . wholly without merit . . ."

Paragraph (c), relates to Petitioner's argument in the Court below as well as here, that it did not own the lands because they were under the supervision and control of the United States and its agencies. The Arizona Court pointed out that the Arizona statute authorizing land taxes is not concerned with possession, but that it is concerned with and imposes the tax consistent with title, either equitable or legal.

Paragraphs (d) and (e) relate solely to procedural matters under Arizona statutes and, finally, paragraph (f), answers the argument presented below and here that Petitioner had no taxable interest in the land until the patents had been issued. There

again the Arizona Court relied upon the decision in the *Chapman* case, that Petitioner did have a vested title and that the issuance of a patent was purely a ministerial function of the Secretary of the Interior. The Arizona Court additionally sustained the holding on this point by reference to federal statute and decisions of this Court in substantiation of the *Chapman* decision.

Upon an examination of the record, a conclusion is inescapable that this Court is asked to review a decision relating to local law and procedure and that when such procedure is effectuated, Petitioner's grievance, if any, will be a matter of state rather than federal law.

Respectfully submitted,

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Office - Supreme Court, U. S.
FILED
OCT 5 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner*,

v.

NAVAJO REALTY COMPANY, CECIL MCCORMICK, ET ALS.

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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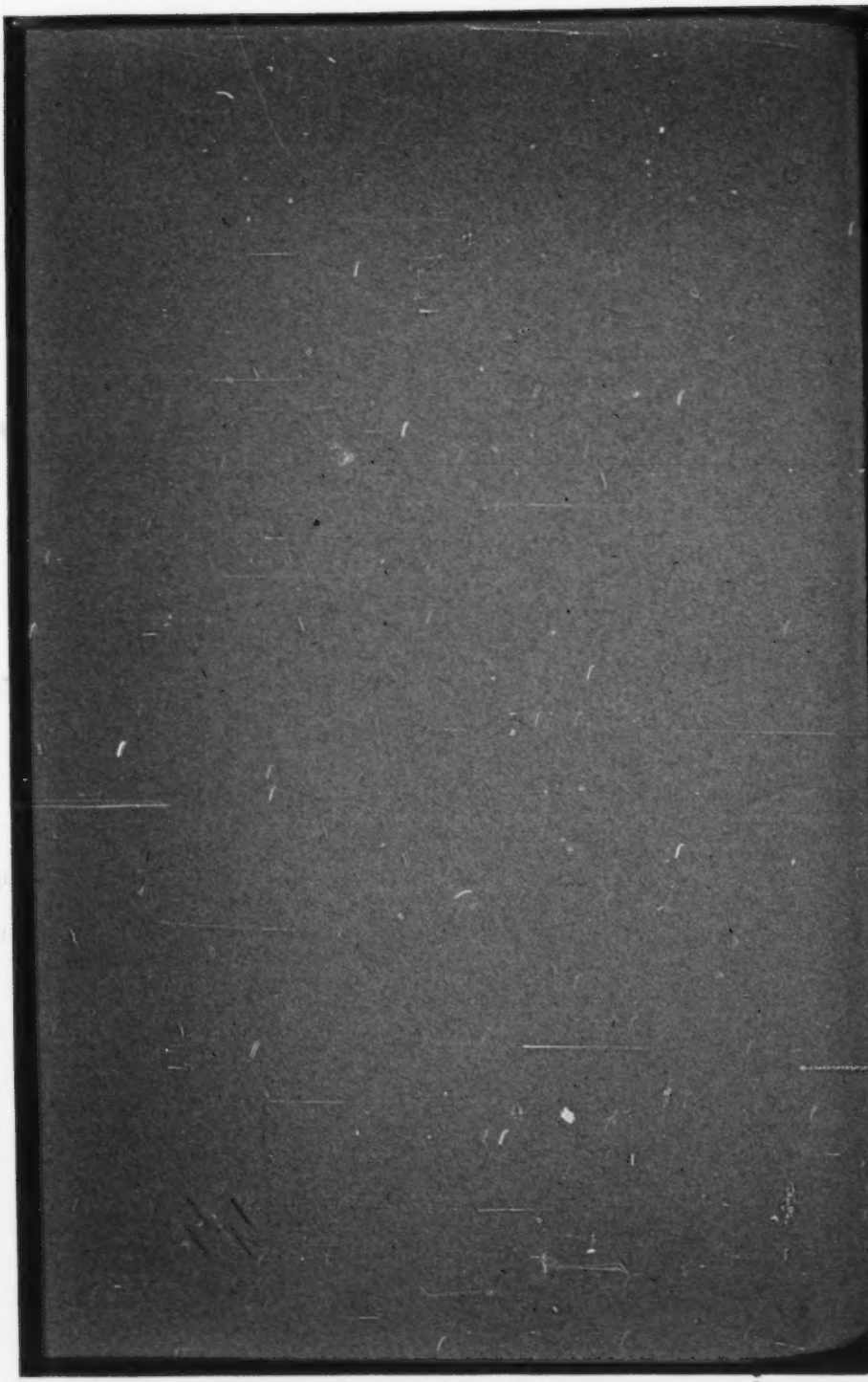

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PETITIONER'S SUPPLEMENTAL MEMORANDUM

This Memorandum is impelled by two material misstatements of fact in respondents' Brief in Opposition.

I. (a) The Attorney General of Arizona says (Br. Op. 7):

> With respect to the time of the assessment, that time has not yet come. * * *
>
> All that has been done is to order the property listed. * * *
>
> No tax has been assessed, levied nor attempted to be collected. * * *

Statements in similar vein appear at Br. Op. 2 and 6.

(b) The record shows precisely the contrary.

(i) Paragraph II of the judgment for peremptory writ of mandamus (NR. 51 at 52-53)[1] "adjudged that it is the statutory duty of Arthur Palmer, as County Assessor, to place said lands upon the County Assessment Roll *and to assess the same as the property of defendant, Aztec Land and Cattle Company* * * *. [Italics added.]

(ii) The same judgment expressly ordered (NR. 54) "a similar writ directing Arthur Palmer, as Navajo County Assessor, immediately upon receipt of said writ and before May 1, 1954, to place said lands upon the County Assessment Roll *and assess the same as the property of Aztec Land and Cattle Company* * * *. [Italics added.]

(c) Pursuant to such direction, the lands in question were duly assessed, and in September 1954, petitioner was billed for the taxes for 1949 to 1954, inclusive, aggregating nearly $115,000.

Thereafter, on September 21, 1955, the County Treasurer of Navajo County notified petitioner that, if the 1954 taxes were not paid, the lands would be sold for taxes on October 17, 1955. An offset reproduction of this notice is attached to the present Memorandum and made part hereof.

On its face, this notice would appear to constitute a plain violation of the stay granted by Mr. Justice

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[1] As in the Petition for Certiorari, "NR" refers to the Abstract of Record in the Navajo County case.

Douglas more than three months previously, on June 2, 1955.

(d) More immediately relevant in the present connection, however, is the circumstance that, in the face of these facts, which are either of record or else well known to the parties to this litigation, the Attorney General of Arizona tells this Court (Br. Op. 7) that "No tax has been assessed, levied nor attempted to be collected."

Further characterization is unnecessary.

II. (a) The Attorney General of Arizona further asserts (Br. Op. 2, 8):

> The decision on which review is sought has become moot, in that patents have been issued to substantially all of the land in question, and such patented land has been returned to the state tax rolls by Petitioner, notwithstanding the stay of execution issued by this Court at Petitioner's request.

(b) The present controversy is far from moot.

Petitioner stated (Pet. 20):

> * * * Subsequent to the issuance of patents, petitioner duly returned the patented land for taxation. All that petitioner asserts here is that it cannot be legally assessed state taxes *before then*, * * *. [Italics added.]

The fair intendment of that statement was that petitioner duly returned the patented lands for taxation after issuance of the patents, i. e., for 1955 and subsequent years, and is contesting the taxes for the

years 1949 to 1954, the period for which it has been billed, the period prior to issuance of patents, the period when petitioner's right to the lands in question was still being contested by the United States, the period when the United States was in possession of the property and dealt with it as its own.

Perhaps petitioner's counsel was remiss in failing to anticipate a reading reminiscent of "the inability of the seventeenth century common law to understand or accept a pleading that did not exclude every misinterpretation capable of occurring to intelligence fired with a desire to pervert." *Paraiso* v. *United States,* 207 U. S. 368, 372.

But, in any event, the fact is that the lands have been returned for taxation only *in futuro,* with the consequence that the present controversy is not in any sense moot.

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,
Counsel for the Petitioner.

OCTOBER, 1955.

#2594 OFFICE OF COUNTY TREASURER

#2594

OFFICE OF COUNTY TREASURER

Aztec Land & Cattle Co.
Box 873
ALbuquerque, New Mexico

Holbrook, Arizona, Sept. 21, 19 55

This is to notify you that I will offer at public sale at the office of the Treasurer of Navajo County, Arizona, on the 17th day of October, 19 55 and on the succeeding days so much of the following described real property, upon which there are delinquent taxes, as shall be necessary to pay the taxes, herein below set down, together with the interest, penalties and charges thereon, to-wit:

Please return Bill with Payment

DESCRIPTION	SECTION	TOWNSHIP	RANGE	LOT NO.	BLOCK NO.	ADDITION	CITY OR TOWN
	T.13 N.	R.15 E.	Acres				
	S. 23	all	640.00				
	S. 25	$E\frac{1}{2}W\frac{1}{2}W\frac{1}{2}$, $E\frac{1}{2}W\frac{1}{2}$, $E\frac{1}{2}$	560.00				
	S. 27	All	640.00				
	S. 35,	Lots 1,2, $N\frac{1}{2}SE\frac{1}{4}$	128.38				
	T.12 N.,	R. 16 E.					
	S. 7,	All Fractional	672.67				
	Sc 9,	All fractional	700.44				
	S. 11,	All fractional	642.86				
	S.13,	All fractional	479.68				
	S. 15,	All	640.00				

The amount of delinquent taxes is ..... $ 17,460.28

Interest due at the dating of this notice ..... $ 1,309.50

Total, $ 18,769.78

Advertising costs in the amount of $192.50 will be added if not paid before Sept. 24, 1955

Very truly yours,

Tony Johnson

COUNTY TREASURER

S. 17, All 640.00
S. 19, all fractional 620.68
S. 21, All 640.00
S. 23, all Fractional 506.72
S. 25, All fractional 576.15
S. 27, All 640.00
S. 29, all 640.00
S. 31, All fractional 581.22
S. 33, All fractional 636.42
S. 35, All 640.00

T. 12 N. R. 17 E.
S. 7, all fractional 551.50
S. 9, All fractional 693.60
S. 11, all fractional 686.80
S. 13, All fractional 442.25
S. 15, all 640.00
S. 17, all 640.00
S. 19, all fractional 624.28
S. 21, all fractional 482.09
S. 23, all fractional 567.57
S. 25, all fractional 634.88
S. 27, all fractional 570.89
S. 29, all fractional 553.36
S. 31, all fractional 626.52
S. 33, all fractional 419.79
S. 35, all fractional 331.67

T. 10 N. R. 20 E.
S. 1, L 3,4, [illegible]
$S\frac{1}{2}NW\frac{1}{4}, SW\frac{1}{4}$ 312.76
S. 3, L 5,6,9, $SE\frac{1}{4}NE\frac{1}{4}$;
$S\frac{1}{2}SW\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}$,
$W\frac{1}{2}SW\frac{1}{4}$, $S[illegible]\frac{1}{4}SW\frac{1}{4}$, $W\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$,
$SE\frac{1}{4}NE\frac{1}{4}NE\frac{1}{4}$, $SW\frac{1}{4}NW\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}NE\frac{1}{4}$
$SW\frac{1}{4}$; 426.80
S. 5, L 1,2,3,4, $S\frac{1}{2}NE\frac{1}{4}$,
$SE\frac{1}{4}NW\frac{1}{4}$, [illegible], [illegible] $SE\frac{1}{4}$,
$E\frac{1}{2}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$ 558.40
S. 7, All fractional 622.28

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S. 9, E½, NW¼, E½NW¼SW¼, SW¼SW¼, E½SW¼	620.00
S.11, All	640.00
S. 13, L 1,2,3,5, W½E½, W½, NW¼SE¼SE¼, N½SW¼SE¼SE¼, SW¼SW¼SE¼SE¼,	619.82
S.15 All	640.00
S 17, N½, SW¼, N½SE¼, SW¼SE¼	600.00
S.19, SE¼, N½NE¼, N½N½SE¼NE¼, N½SW¼NE¼ L 1,2,3,4 E½W½	576.24
S. 21 All fractional	627.55
S. 23, all fractional	517.07

T. 11N., R. 21 E.

S. 5, All fractional	432.82
S. 7, all fractional	636.88
S. 9, all	640.00
S. 11, all	640.00
S. 13, all fractional	642.56
S. 15, all	640.00
S. 17, E½, N½NW¼, SE¼NW¼, N½SW¼NW¼, S½SW¼	540.00
S. 19 E½NE¼, SW¼NE¼, S½NW¼NE¼, NE¼NW¼NE¼, E½SE¼NW¼, SW¼SE¼NW¼, NE¼SW¼, NW¼SE¼, Lot 4, SE¼SE¼, SE¼SW¼SE¼, N½NE¼SE¼, SW¼NE¼SE¼	379.33
S. 21 E½, N½SE¼, SW¼SE¼, N½SE¼SE¼, N½S½SE¼SE¼, N½NE¼SW¼, SE¼NE¼SW¼, S½SW¼SW¼, SW¼SE¼SW¼	520.00
Sec. 23 All	640.00
S. 25 All fractional	643.59
S. 27 E½W½, E½E½W½NW¼, NW¼SW¼, E½SW¼SW¼, E½	560.00
S 29, S½. SE¼, NW¼NW¼NW¼, S½SW¼NW¼, S½SW¼NE¼	630.00
S. 31 All fractional	635.13

Office - Supreme Court, U. S.
FILED
OCT 6 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner,*

v.

NAVAJO REALTY COMPANY, CECIL MCCORMICK, ET ALS.

PETITIONER'S FURTHER MEMORANDUM

Reference is respectfully made to Petitioner's Supplemental Memorandum, filed with this Court on October 5, 1955, and to the Notice of Sale referred to at p. 2 thereof and reproduced in facsimile following p. 4.

Upon receipt of the original Notice of Sale, counsel for petitioner called on the Attorney General of Arizona and on the County Treasurer of Navajo County to withdraw such notice, in default of which the institution of contempt proceedings was proposed.

The Attorney General of Arizona now advises that, in response to such demand,

> the County Treasurer of Navajo County, Arizona, at our request, has agreed to postpone the sale of the Aztec Land and Cattle Co. land for delinquent taxes, scheduled for October 17, 1955. The County Treasurer, not being a party to the suit and having had no notice of the stay of execution issued by Justice Douglas on June 2, 1955, was proceeding in accordance with a statutory duty.

The Court will judge for itself how far this explanation squares with the representations made by the Attorney General of Arizona in his Brief in Opposition herein that (p. 7)—

> With respect to the time of the assessment, that time has not yet come. * * *
>
> All that has been done is to order the property listed. * * *
>
> No tax has been assessed, levied nor attempted to be collected. * * *

Respectfully submitted.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N. W.,
Washington 6, D. C.,

Counsel for the Petitioner.

OCTOBER, 1955.

FILED
OCT 13 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner,*

v.

NAVAJO REALTY COMPANY, CECIL MCCORMICK, *Et Al.*

REPLY TO PETITIONER'S SUPPLEMENTAL MEMORANDUM AND PETITIONER'S FURTHER MEMORANDUM

ROBERT MORRISON
The Attorney General
State of Arizona

R. G. LANGMADE
Assistant Attorney General
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Phoenix, Arizona
Counsel for Respondent
State of Arizona

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 210

AZTEC LAND AND CATTLE COMPANY, *Petitioner,*

v.

NAVAJO REALTY COMPANY, CECIL MCCORMICK, *Et Al.*

REPLY TO PETITIONER'S SUPPLEMENTAL MEMORANDUM AND PETITIONER'S FURTHER MEMORANDUM

Counsel for Petitioner having threatened the institution of contempt proceedings against a public officer of Navajo County, Arizona, who was not a party, and having directly impugned the integrity of the Attorney General of Arizona in his "Supplemental Memorandum" and "Further Memorandum" filed with this Court during the first week in October, it is necessary in fairness and justice to submit this reply. The gist of the matter is referred to at page 2 of Petitioner's Supplemental Memorandum, wherein counsel for Petitioner makes this charge:

> "On its face, this notice would appear to constitute a plain violation of the stay granted by Mr. Justice Douglas more than three months previously, on June 2, 1955."

In Petitioner's Further Memorandum it is said:

> "Upon receipt of the original Notice of Sale, counsel for

petitioner called on the Attorney General of Arizona and on the County Treasurer of Navajo County to withdraw such notice, in default of which the institution of contempt proceedings was proposed."

May it be remembered that the question before this Court is whether or not, under its rules and its prior decisions, this Court is warranted in reviewing a final decision of the Supreme Court of Arizona ordering certain lands owned by Petitioner to be placed on the tax rolls of the counties in which they lie. The matters with which we are not concerned are events happening subsequent to April 21, 1955, when the Supreme Court of Arizona handed down its decision. Everything said in the two memoranda of Petitioner's counsel and in this memorandum relates to events subsequent to the date of the decision. These are the chronological happenings:

1. Between April 21 and May 9, 1955, patents were issued to Aztec Land and Cattle Company by the United States Bureau of Land Management.

2. On May 9, 1955, T. W. Cabeen, Vice President of Aztec Land and Cattle Company wrote to the Navajo County Assessor as follows:

"AZTEC LAND AND CATTLE COMPANY, LIMITED
T. W. Cabeen, Vice-President
Krober Building
P. O. Box 873
Albuquerque, New Mexico

May 9, 1955

Mr. Arthur Palmer, Assessor
Navajo County
Holbrook, Arizona

Dear Arthur:

Herewith list of lands patented to us in Phoenix 080632.

These lands are of course in addition to those listed in our regular return as of January 1, 1955.

Best regards.

Sincerely

T. W. CABEEN

Vice President"

Attached to this letter were legal descriptions of some 35,234.49 acres of land lying in Navajo County.

3. This return, so that the lands could be assessed under the Laws of the State of Arizona, was all that was required, intended or ordered by the Supreme Court of Arizona in its decision of April 21, 1955, with regard to these particular lands.

4. On June 2, 1955, Mr. Justice Douglas ordered the execution and enforcement of the judgments of the Supreme Court of Arizona be stayed pending the timely filing and disposition of a Petition for Certiorari. We note, by way of emphasis, the stay order was issued June 2, 1955, and the return was made by Petitioner on May 9, 1955.

5. On July 7, 1955, Petitioner filed for Writ of Certiorari, and thereafter the request of the Attorney General of Arizona for an extension of time to file a Brief in Opposition until October 1, 1955, was granted. The Brief in Opposition was prepared and sent to the printer during September, 1955, and the printed volumes were transmitted to the Court on September 26, 1955.

6. Five days before the printed Brief in Opposition was mailed to this Court, the County Treasurer of Navajo County prepared an assessment and mailed the tax assessment on September 21, 1955, to Petitioner. The County Treasurer was not a party to the proceedings before the Supreme Court of Arizona and had no actual notice of the state of those proceedings nor of the stay

of execution issued by this Court. All that he had notice of was that certain lands now appeared upon the tax rolls of Navajo County on which no assessments had been made or taxes collected. He proceeded thereupon in accordance with his bounden statutory duty set forth in Sections 73-701 and 73-802, ACA, 1939. The latter provision requires that:

> "The county treasurer shall immediately after the first Monday in May make a back tax book of all persons delinquent on the rolls, and shall collect the taxes due thereon."

Section 73-804, ACA, 1939, requires the County Treasurer to advertise and sell property on which taxes are unpaid and delinquent. Furthermore, the County Treasurer proceeded in accordance with Section 73-820, ACA, 1939, which provides in part:

> " . . . that no sale for unpaid tax shall be commenced at a date later than five (5) years after delinquency, . . ."

In the face of these statutory proceedings, none of which were involved or considered in the decision of the Supreme Court of Arizona, the County Treasurer of Navajo County, Arizona, without the advice of the Attorney General of the State of Arizona, assumed that the return of the lands by the Aztec Land and Cattle Co., Ltd., dated May 9, 1955, amounted to the acceptance by it of the decision of the Supreme Court of the State of Arizona in Aztec Land and Cattle Co. vs. Navajo Realty Co., 283 P. 2d 227.

Subsequent to the receipt of notice of sale, counsel for petitioner threatened to institute contempt proceedings in this Court, and notified the Attorney General of Arizona of that threat, unless the statutory action was suspended. This is not the time to argue the validity of such a threat or the proceedings themselves. Suffice it to say that the Attorney General of the State of Arizona, as a result of the petitioner's threat, and in order to avoid any possibility of "muddying the waters" and diverting the attention of this Court from the real issue before it, which was the review of the

decision of the Supreme Court of Arizona, suggested to the County Treasurer, who was agreeable to the suggestion, that the sale be postponed.

Regardless of the propriety of the action taken by the County Treasurer, it has absolutely no bearing on whether or not this Court should review the decisions of the Arizona Supreme Court. However, these events subsequent to the decision have been usd by counsel for petitioner as a springboard for further pleas to this Court to assume jurisdiction to review the decisions. In further support of these pleas, petitioner quotes out of context from the brief in opposition and seeks thereby to show misstatements of fact in the light of the subsequent events. We must insist that those statements, when read in context, are as valid an argument at this time as they were when made. The complete argument at page seven of the brief in opposition, as it relates to the decision of the Supreme Court of Arizona, and from which petitioner draws its out of context quotations for the sake of misleading innuendoes, is repeated in demonstration of the point:

> "The Arizona Supreme Court did not assess state taxes upon the land in question, nor did it attempt to do so, nor has anyone else up to this moment assessed taxes upon the land, nor can this be done until the property is placed upon the tax rolls. All that the Arizona Court ordered was that the property be placed upon the tax rolls.
>
> "The listing of property on the tax rolls is a condition precedent to its assessment and the levy of taxes thereon." (page 7, Brief Opp.)

This property was listed on the tax rolls voluntarily by Petitioner on May 9, 1955. Upon this listing, assessment and collection statutes became applicable. If Petitioner now has objections to the amount of the tax proposed to be collected, the law is well settled in Arizona as to the procedure it should follow in contesting the tax. May it be noted that one of several courses provided by law does not include the spurious threat of instituting contempt pro-

ceedings. Section 73-841, ACA, 1939, specifically requires that the taxpayer shall first pay the tax and that:

> "After payment an action may be maintained to recover any tax illegally collected and if the tax due shall be determined to be less than the amount paid, the excess shall be refunded in the manner hereinbefore provided."

With respect to this section, the Supreme Court of Arizona, having passed upon it a number of times, has laid down certain well-defined rules. In *Santa Fe Trail Transportation Company, et al, vs. Bowles,* 62 Ariz. 177, 156 P. 2d 722, the Supreme Court of Arizona reviewed the authorities on the subject and then said:

> "If there is no semblance of authority for imposition of tax, injunction will lie, but if there is some semblance of authority for the imposition, taxpayer's remedy is to pay the tax under protest and then test its validity by suing for recovery of amount so paid under said Section 73-841."

In substantiation of the decision in the foregoing case, the Supreme Court of Arizona cited from this Court: *Matthews vs. Rodgers,* 284 U.S. 521, 52 S.Ct. 217. 76 L.Ed. 447; *McMillen vs. Anderson,* 95 U.S. 37, 24 L.Ed. 335.

Notwithstanding the remedies available to Petitioner, it presumably would have this Court decide the validity of a tax levy made September 21, 1955, by petitioning for a review of decisions of the Supreme Court of Arizona made April 21, 1955, holding that the lands now in question and other lands similarly subject to the decision belong on the state tax rolls.

In conclusion, it must be pointed out that, the public officers of Arizona have sought to avoid the injection of extraneous issues into the proceedings for certiorari even to the extent of suspending, perhaps without valid authority, the operation of Arizona tax laws. Nevertheless, this effort to have a clean issue before this

Court was precluded by the full scale attempt by the counsel for the petitioner (after his threats and demands had been acceded to by the County Treasurer of Navajo County, Arizona, and after he had been notified to that effect by the Attorney General of the State of Arizona) to do by indirection what he threatened to do directly, unless the tax sale was postponed. What was said in the Brief in Opposition to the Petition stands unchallenged by subsequent developments. The implications, innuendoes and calumny directed against the public officers of Arizona, we sincerely believe, will not divert this Court from the question of the issuance of the Petition for a Writ of Certiorari. Under the rules and decisions of this Court, the Petition should be denied.

Respectfully submitted,

ROBERT MORRISON
The Attorney General
State of Arizona

R. G. LANGMADE
Assistant Attorney General
108 Capitol Building
Phoenix, Arizona

Counsel for Respondent